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Supreme Court, U.S.
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No. 98-545

IN THE

Supreme Court of the United States

October Term, 1997

FLUOR DANIEL (NPOSR), INC.,
a Delaware Corporation,

Petitioner,

vs.

DAVID G. SEWARD,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of Wyoming

BRIEF FOR RESPONDENT

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88 pp

QUESTION PRESENTED FOR REVIEW

Should a Writ of Certiorari issue to review the decisions of the Wyoming Supreme Court upholding a default judgment where:

1. No Due Process or other issue of federal law was timely raised before, nor addressed by, the Wyoming Supreme Court;

2. The default judgment was properly granted under the Wyoming Rules of Civil Procedure; and

3. In the unanimous view of the Wyoming Supreme Court and the state trial court below, the Petitioner failed in its burden of proving facts necessary to justify relief from the default judgment?

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STATEMENT OF BASIS FOR JURISDICTION

Petitioner seeks to invoke jurisdiction under 28 U.S.C. § 1257. For the reasons set forth hereinafter, Respondent believes jurisdiction is not present, as no federal issue was properly raised by Petitioner in, nor addressed by, the state court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., 14th Amendment:

Section 1

Citizenship Rights Not to Be Abridged by States.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C § 1257. State courts; certiorari:

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a

> treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Wyo. Stat. § 5-2-114. Rules and forms governing pleading, practice and procedure in all courts; power to adopt, modify and repeal:

> The supreme court of Wyoming may from time to time adopt, modify and repeal general rules and forms governing pleading, practice and procedure, in all courts of this state, for the purpose of promoting the speedy and efficient determination of ligitation upon its merits.

Wyo. Stat. § 5-2-115. Rules and forms governing pleading, practice and procedure in all courts; application of rules:

> (a) Such rules may govern:
>
> (i) The forms of process, writs, pleadings and motions and the subjects of parties, depositions, discovery, trials, evidence, judgments, new trials, provisional and final remedies and all other matters of pleading, practice and procedure; and

(ii) Any review of or other supervisory proceedings from the judgment or decision of any court, board, officer, or commission when such review is authorized by law.

(b) Such rules shall neither abridge, enlarge nor modify the substantive rights of any person nor the jurisdiction of any of the courts nor change the provisions of any statute of limitations.

Wyo. Stat. § 17-16-1510. Service on foreign corporation:

(a) The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice or demand required or permitted by law to be served on the foreign corporation.

* * *

Rule 4, Wyo. R. Civ. P. Process:

(a) *Issuance of summons.* — Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the sheriff or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

(b) *Form of summons.* — The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the

parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of the defendant's failure to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

(c) *By whom served.* — Process may be served:

(1) Within the state, by the sheriff of the county where the service is made, or by the undersheriff or deputy, or, at the request of the party causing same to be issued, by any other person of the age of majority, not a party to the action, appointed for such purpose by the clerk;

* * *

(d) *Personal service.* — The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

* * *

(4) Upon a corporation, by delivery of copies to any officer, manager, general agent, or agent for process.

* * *

Rule 12, Wyo. R. Civ. P. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on the pleadings:

(a) *When presented.* — A defendant shall serve an answer within 20 days after the service of the summons and complaint upon the defendant, or if service be made without the state, or by publication, within 30 days after such service or within 30 days after the last day of publication * * *

Rule 55, Wyo. R. Civ. P. Default:

(a) *Entry.* — When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

(b) *Judgment.* — Judgment by default may be entered as follows:

* * *

(2) By the Court. — In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against a minor or an incompetent person unless represented in the action by a guardian, guardian ad litem, trustee, conservator, or other such representative who has appeared therein. If the party against whom a judgment by default is sought has appeared in the action the party (or, if appearing by representative, the party's representative) shall be served with written notice of

the application for judgment at least three days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute.

(c) *Setting aside default.* — For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

Rule 60, Wyo. R. Civ. P. Relief from judgment or order:

* * *

(b) *Other reasons.* — On motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an

adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. * * *

STATEMENT OF THE CASE

Petitioner has failed to comply with this Court's Rule 14.1(g)(i). If Petitioner had complied with the rule, it would have informed the Court that the federal question sought to be reviewed was not raised in the state trial court, nor even in Petitioner's appeal to the Wyoming Supreme Court. Instead, the Due Process issue was raised for the first time in a petition for rehearing submitted to the Wyoming Supreme Court after its unanimous decision affirming the trial court's default judgment. Moreover, the belatedly-raised federal issue was not addressed by the Wyoming Supreme Court; Petitioner's request for rehearing was denied without comment by that court.

In a similar vein, Petitioner misstates the nature of the notice that was provided to Petitioner regarding the pendency of Respondent's suit. Petitioner repeatedly refers to the absence of "actual knowledge" or "notice" of the filing of the lawsuit or service of process on Petitioner's part. See Petition at 10, 11, 12. In truth, Petitioner had both notice and actual knowledge of the suit as follows:

On September 9, 1996, a copy of the summons and complaint were served upon Petitioner's registered agent for service of process in Cheyenne, Wyoming. The summons, which complied in all respects with Rule 4, Wyo. R. Civ. P., advised Petitioner:

> "YOU ARE HEREBY SUMMONED and required to file with the Clerk and serve upon the Plaintiff's attorneys an answer to the Complaint and Jury Demand which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and Jury Demand."

Respondent's Appendix ("Resp. App.") 1 at 1.1. On the same day it received service of process, Petitioner's registered agent sent the summons and complaint via Federal Express to Petitioner's Irvine, California headquarters. The Federal Express package was addressed to the attention of Erin C. Kantor, Legal Assistant. Resp. App. 2 at 2.5. The package arrived at its destination the following day, September 10, 1996. Id. at 2.7.

According to Ms. Kantor, due to a hectic schedule she did not discover the documents until five weeks later, on October 17, 1996. Petitioner's Appendix ("Pet. App.") K at 51a. Still, no appearance was entered on behalf of Petitioner in the case until one week later, on October 24, 1996. Pet. App. B at 6a.

On November 5, 1996, Petitioner filed its motion to set aside the default judgment and an 18-page supporting brief, asserting as grounds (1) that Respondent would not be prejudiced if the default judgment were set aside; (2) the existence of meritorious defenses; and (3) that Petitioner's conduct was not "sufficiently culpable" to justify a default judgment. See Resp. App. 3, 4. Significantly, *no Due Process or other federal issue was raised.* Petitioner's motion was supported by the affidavit of Ms. Kantor. Pet. App. K at 49a. In response, Respondent submitted the deposition of the receptionist who accepted service of process at the office of Petitioner's registered agent in Wyoming. Resp. App. 2.

Petitioner's motion was called up for hearing before the trial judge on November 25, 1996. Petitioner's counsel appeared at the hearing and argued Petitioner's cause. Pet. App. E at 19a.

On December 3, 1996, the trial court issued its decision letter denying Petitioner's motion, finding that Petitioner had not met its burden. Pet. App. F at 21a. In the order that followed, the trial court expressly found that Petitioner's neglect in failing to answer the complaint was inexcusable, and that "culpable conduct" by Petitioner led to the entry of default and default judgment. Pet. App. E at 20a.

On appeal to the Wyoming Supreme Court, Petitioner made the same arguments that had not been persuasive to the trial court. As with its motion and brief in the trial court, in Petitioner's 22-page appellate brief dated February 27, 1997, *no Due Process or other federal issue was raised.* See Resp. App. 5. Petitioner then filed a reply brief dated March 19, 1997. Again, *no Due Process or other federal issue was raised.* See Resp. App. 6.

In its April 10, 1998 decision, the Wyoming Supreme Court affirmed, stating, "[W]e agree with the trial court that the culpable conduct lead to the Entry of Default and Default Judgment." Pet. App. B at 14a. Indeed, the court commended the trial judge for his exercise of sound discretion:

> The opinion of the trial judge is reasoned and manifests a sound judgment exercised with regard to what is right under the circumstances. We do not perceive it to be arbitrary or capricious.

Id. at 13a. The court concluded,

> The award in this case is significant, and the Default Judgment was entered very expeditiously, but the Wyoming Rules of Civil Procedure were complied with at all times.

Id.

On April 27, 1998, Petitioner filed a petition for rehearing with the Wyoming Supreme Court, artfully chiding the court for its "failure to address Due Process and public policy concerns" in its decision. Pet. App. I at 27a. The petition for rehearing was accompanied by a brief in which Petitioner asserted, *for the first time*, its Due Process argument. Pet. App. J at 30a *et seq*.

The Wyoming Supreme Court denied the petition for rehearing in a two-paragraph order dated May 5, 1998, set out in full below:

> Appellant, Fluor Daniel (NPOSR), Inc., having filed with this Court its Petition for Rehearing together with Brief of Appellant in Support of Petition for Rehearing, and the Court having reviewed the file and record of the court, it is
>
> ORDERED that Appellant's Petition for Rehearing be and it hereby is denied.

Pet. App. A at 1a-2a.

ARGUMENT

1. This Court lacks jurisdiction because no federal issue was properly raised by Petitioner in, nor passed upon by, the state court below.

It has long been this Court's rule, in reviewing state court judgments under 28 U.S.C. § 1257, that a petitioner's federal claim will not be considered unless it was either addressed by, or properly presented to, the state court. *Adams v. Robertson*, 520 U. S. 83, 137 L. Ed.2d 203, 208, 117 S. Ct. 1028 (1997); *Heath v. Alabama*, 474 U. S. 82, 87, 88 L. Ed.2d 387, 106 S. Ct. 433 (1985); *Illinois v. Gates*, 462 U. S. 213, 217-219, 76 L. Ed.2d 527, 103 S. Ct. 2317 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U. S. 430, 434, 84 L. Ed. 849, 60 S. Ct. 670 (1940).

Petitioner has the burden to show that the issue was properly presented to the state court. *Adams*, 137 L. Ed.2d 203, 208. When the highest state court is silent on a federal question, this Court

assumes that the issue was not properly presented, *Adams*, 137 L. Ed.2d 203, 208; *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U. S. 537, 550, 95 L. Ed.2d 474, 107 S. Ct. 1940 (1987), and the aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had "a fair opportunity to address the federal question that is sought to be presented here," *Webb. v. Webb*, 451 U. S. 493, 501, 68 L. Ed.2d 392, 101 S. Ct. 1889 (1981). See also *Exxon Corp. v. Eagerton*, 462 U. S. 176, 181, n. 3, 76 L. Ed.2d 497, 103 S. Ct. 2296 (1983); *Fuller v. Oregon*, 417 U. S. 40, 50, n. 11, 40 L. Ed.2d 642, 94 S. Ct. 2116 (1974); *Street v. New York*, 394 U. S. 576, 582, 22 L. Ed.2d 572, 89 S. Ct. 1354 (1969).

Important policy considerations are served by the rule:

> The rule serves an important interest of comity. *Bankers Life & Casualty Co.* [*v. Crenshaw*, 486 U. S. 71, 79, 100 L. Ed.2d 62, 108 S. Ct. 1645 (1988)]. As we recently explained, "it would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb*, 451 U. S. at 500, 68 L. Ed.2d 392, 101 S. Ct. 1889 (citations and internal quotation marks omitted). Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. *Gates, supra*, at 221-222, 76 L. Ed.2d 527, 103 S. Ct. 2317. * * *

> Our traditional standard also reflects "practical considerations" relating to this Court's capacity to decide issues. *Bankers Life & Casualty Co., supra*, at 79, 100 L. Ed. 2d 62, 108 S. Ct. 1645. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record. See *Webb, supra*, at 500, 68 L. Ed.2d 392, 101 S. Ct. 1889.

Adams, 137 L. Ed.2d 203, 210-211.

Consistent with the rule's underlying rationale, this Court has generally refused to consider issues raised for the first time in a petition for rehearing when the state court is silent on the question. *Adams*, 137 L. Ed.2d 203, 210, n. 3; *Board of Directors of Rotary Int'l.*, 481 U. S. 537, 539-540; *Hanson v. Denckla*, 357 U. S. 235, 244, n.4, 2 L. Ed.2d 1283, 78 S. Ct. 1228 (1958); *Radio Station WOW, Inc. v. Johnson*, 326 U. S. 120, 128, 89 L. Ed. 2092, 65 S. Ct. 1475 (1945).

Similarly, this Court has respected the practice of a state court not to consider issues raised for the first time on appeal. *Exxon*, 462 U. S. 176, 181, n. 3. Such is the practice in Wyoming, where issues must be timely raised in the trial court, and will not be considered when raised for the first time on appeal. *Bredthauer v. TSP*, 864 P.2d 442, 446 (Wyo. 1993). Wyoming strongly adheres to this rule because

> "it is unfair to reverse a ruling of a trial court for reasons that were not pre-

> sented to it, whether it be legal theories or issues never formally raised in the pleadings nor argued to the trial court."

Id. at 447 (quoting *Oatts v. Jorgenson*, 821 P.2d 108, 111 (Wyo. 1991)).

Wyoming departs from this rule only for jurisdictional issues and issues "of such a fundamental nature that they must be considered." *WW Enterprises, Inc. v. City of Cheyenne*, 956 P.2d 353, 356 (Wyo. 1998), *Edgcomb v. Lower Valley Power and Light, Inc.*, 922 P.2d 850, 858 (Wyo. 1996). The Wyoming Supreme Court has refused to apply this exception to equal protection claims raised for the first time on appeal, *Vigil v. Ruettgers*, 887 P.2d 521, 526 (Wyo. 1994) (appellant's equal protection argument "does not involve a fundamental matter of which we will take cognizance"), and Fourteenth Amendment Due Process claims raised for the first time on appeal, *Swisse v. City of Sheridan*, 561 P.2d 712 (Wyo. 1977). See also *WW Enterprises, supra,* 956 P.2d 353, 356.

The Wyoming Supreme Court is even more reluctant to address issues that are not raised in the appellant's initial supreme court brief, holding generally that such issues are considered waived. *Doctors' Co. v. Insurance Corp. of America*, 864 P.2d 1018 (Wyo. 1993); *Triton Coal Co., Inc. v. Mobil Coal Producing, Inc.*, 800 P.2d 505, 512 (Wyo. 1990). Thus, "points raised for the first time in a a petition for rehearing will ordinarily not be considered." *Mayor v. Board of Land Com'rs*, 195 P.2d 752 (Wyo. 1948). This rule is "especially applicable" to constitutional claims raised for the first time in a petition for rehearing. *Walgreen Co. v. State Bd. of Equalization*, 169 P.2d 76, 77 (Wyo. 1946).

Plainly, Petitioner did not raise its Due Process argument in the state court below prior to its filing of a petition for rehearing with the Wyoming Supreme Court. See Resp. App. 3, 4, 5 and 6; cf. Pet. App. I, J. Under Wyoming's procedural rules and law, the issue was not timely raised. Moreover, the Wyoming Supreme Court did not address the belatedly-raised Due Process claim in its order denying the petition for rehearing. Pet. App. A. Accordingly, since Wyoming's highest state court is silent on the Due Process question, this Court must assume that the issue was not properly presented below.

Finally with respect to the timeliness of Petitioner's assertion of the Due Process claim, this case does not constitute one of those "very rare exceptions," *Yee v. Escondido*, 503 U. S. 519, 533, 118 L. Ed.2d 153, 112 S. Ct. 1522 (1992), in which the Court may depart from its "raised and addressed below" rule. This is not a case like *Aetna Life Insurance Co. v. Lavoie*, 475 U. S. 813, 89 L. Ed.2d 823, 106 S. Ct. 1580 (1986), in which the petitioner discovered some fundamental Due Process impropriety (there, the involvement of a state supreme court justice in two actions against insurance companies) too late to raise it in a timely manner in the state court.

Nor is this a case like *Herndon v. Georgia*, 295 U. S. 441, 79 L.Ed. 1530, 55 S. Ct. 794 (1935), in which the petitioner could not reasonably have anticipated a new rule of law from the state court. Here, the Wyoming Supreme Court followed precisely the same legal test, and applied the same cases in the same manner, as in numerous prior default judgment cases. Pet. App. B at 9a-14a. No new law was made in this case.

2. State courts are free to set their own procedural rules so long as requisites of Due Process are met.

It is well established that each state is free to regulate the procedure of its courts, unless in doing so it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Brown v. Mississippi*, 297 U. S. 278, 285, 80 L. Ed. 682, 56 S. Ct. 461 (1936) (quoting *Snyder v. Massachusetts*, 291 U. S. 97, 105, 78 L. Ed. 674, 54 S. Ct. 330 (1934)). In *Hardware Dealers Mutual Fire Ins. Co. of Wisconsin v. Glidden Company*, 284 U. S. 151, 158, 76 L. Ed. 214, 52 S. Ct. 69 (1931), this Court stated:

> [I]t suffices to say that the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control. The 14th Amendment neither implies that all trials must be by jury, nor guarantees any particular form or method of state procedure. See *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 10 L. ed. 818, 46 S. Ct. 384. In the exercise of that power and to satisfy a public need, a state may choose the remedy best adapted, in the legislative judgment, to protect the interests concerned, provided its choice is not unreasonable or arbitrary, and the procedure it adopts satisfies the constitutional requirements of reasonable notice and opportunity to be heard.

This rule was recently reiterated in *Heller v. Doe*, 509 U. S. 312, 322, 125 L. Ed.2d 257, 113 S. Ct. 2637

(1993) (quoting *Medina v. California*, 505 U. S. 437, 451, 120 L. Ed.2d 353, 112 S. Ct. 2572 (1992)):

> "The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to" the party challenging the existing procedures.

Consistent with the foregoing rule, the Wyoming legislature has delegated to the Wyoming Supreme Court the responsibility for "adopting, modifying and repealing" rules of practice and procedure in Wyoming's state courts. Wyo. Stat. §§ 5-2-114, 115. In response, the Wyoming Supreme Court has adopted procedural and appellate rules modeled after their federal counterparts. And although the Wyoming Supreme Court has stated on several occasions that federal court treatment of parallel federal rules is highly persuasive, it has also declined to apply federal doctrine where it believes a different application is more appropriate. See, e.g., *Miller v. Murdock*, 788 P.2d 614, 616 (Wyo. 1990) (declining to apply federal "unique circumstances" doctrine to excuse late filing of a notice of appeal). Thus, the Wyoming Supreme Court's refusal to apply the more liberal federal standard of "excusable neglect" to the instant case is hardly unprecedented.

It is ironic that Petitioner should now argue that the rule of *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U. S. 380, 123 L. Ed.2d 74, 113 S. Ct. 1489 (1993) is so fundamental that its application must be extended to state courts. The *Pioneer* case was not cited by Petitioner in its trial court motion to set aside the default judgment and supporting brief, nor in its initial brief to

the Wyoming Supreme Court, nor in its reply brief to that court. See Resp. App. 3, 4, 5 and 6.

3. There was no infringement upon Petitioner's Due Process rights.

It is well established that the words "due process" require at a minimum that deprivation of property by adjudication "be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313, 94 L. Ed. 865, 70 S. Ct. 652 (1950). However,

> Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance. . .

Boddie v. Connecticut, 401 U. S. 371, 378, 28 L. Ed.2d 113, 91 S. Ct. 780 (1971) (citing *Windsor v. McVeigh*, 93 U. S. 274, 278, 23 L. Ed. 914 (1876)).

> "What the Constitution does require is an *opportunity* . . . granted at a meaningful time and in a meaningful manner," *Armstrong v. Manzo*, 380 U. S. 545, 552, 14 L. Ed.2d 62, 66, 85 S. Ct. 1187 (1965) (emphasis added) "for [a] hearing appropriate to the nature of the case," *Mullane v. Central Hanover Tr. Co.*, supra, at 313, 94 L. Ed. at 873.

Boddie, supra, 401 U. S. 371, 378.

Petitioner had several opportunities to be heard below. First, it had the opportunity to defend itself against Respondent's claim, and was advised in clear language on the face of the summons that if it did not answer within twenty days of service of the summons and complaint, judgment by default would be taken against it. See Resp. App. 1; cf. Wyo. R. Civ. P. 4(b). Personal service of the summons and complaint was made upon Petitioner's registered agent for service of process—the proper party for service of process under Wyoming law. See Resp. App. 1, 2; cf. Wyo. Stat. § 17-16-1510; Wyo. R. Civ. P. 4(d)(4).

Not only was personal service of process properly made upon Petitioner's registered agent, but the registered agent discharged its duties by promptly transmitting the summons and complaint by overnight courier to Erin C. Kantor, the legal assistant who was responsible for processing of legal papers at Petitioner's California headquarters. Resp. App. 2 at 2.5. Thus, on the very day after personal service was obtained in Wyoming, Petitioner had actual notice of (1) Respondent's claim; (2) Petitioner's opportunity to appear and defend the claim; and (3) the fact that judgment by default would be taken in the event Petitioner failed to make a timely defense.

Next, Petitioner had the opportunity to seek relief from the judgment under Wyoming's procedural rules. See Wyo. R. Civ. P. 55(c) and 60(b). Petitioner submitted a lengthy brief in support of its motion, Resp. App. 4, and appeared at the hearing of the motion to argue its cause. See Pet. App. E at 19a.

It is no wonder that Petitioner was unable to convince the trial court that its failure to appear and defend itself was the result of "excusable neglect". Although the affidavit of Petitioner's legal assistant, Ms.

Kantor, sets forth several possible reasons why the summons and complaint were overlooked for five weeks after they were delivered to her, it offers no explanation as to what efforts, if any, were made to avoid such a calamity. For instance, although Ms. Kantor states that "the entire legal staff" was absent on the day the Federal Express package containing the summons and complaint was received, no explanation is given as to what arrangements were made to process incoming lawsuits in the entire legal staff's absence. See Pet. App. K at 51a.

Similarly, Ms. Kantor does not state what efforts were made to locate and review incoming mail after the legal staff returned. Nor does she state what efforts were made to compensate for her own absence during the legal seminar, jury duty and secretarial change that reportedly disrupted her work during the weeks that followed. Id. at 51a-52a.

Presented with such a scanty explanation, the trial court concluded that Petitioner simply had not met its burden for relief under Rules 55 and 60, Wyo. R. Civ. P. Pet. App. F at 21a. The trial court found, based upon the record before it, "Culpable conduct by the Defendant led to the entry of default and default judgment," and entered a written order denying Petitioner's motion to set aside the entry of default and default judgment. Pet. App. E at 20a-21a.

Next, Petitioner had the right to appeal the trial court's decision directly to the Wyoming Supreme Court, there being no intermediate appellate court in Wyoming. Petitioner submitted both an initial brief, Resp. App. 5, and a reply brief, Resp. App. 6, in support of its cause.

The Wyoming Supreme Court's review of the trial court's decision is hardly the "pro forma" treatment suggested by Petitioner. The appellate court's unanimous written decision begins with a summary of the essential facts of the case, followed by a restatement of each party's presentation of the issues on appeal. Pet. App. B at 4a-5a. Next, the appellate court recites in more detail the factual record upon which the trial court made its decision, and reports the reasoning applied by the trial court in reaching its decision. Id. at 6a-7a.

The Wyoming Supreme Court's written opinion then proceeds with a review of the applicable procedural rules, and a statement of the appropriate standard of review: "Decisions resolving motions for setting aside the entry of default or a default judgment are made in the exercise of sound discretion by the trial court." [Citations omitted]. Id. at 8a-9a.

Next, the appellate court discusses numerous Wyoming default judgment cases which must guide the trial judge's exercise of discretion, embarking then upon an application of those cases to the facts of the instant case and the arguments of Petitioner. Id. at 9a-14a. The Wyoming Supreme Court ends its careful review of the case with the conclusion, "[W]e agree with the trial court that the culpable conduct lead to the Entry of Default and Default Judgment." Id. at 14a. The appellate court goes on to commend the trial judge for his exercise of sound discretion:

> The opinion of the trial judge is reasoned and manifests a sound judgment exercised with regard to what is right under the circumstances. We do not perceive it to be arbitrary or capricious.

Id. at 13a. Wyoming's highest court concludes,

> The award in this case is significant, and the Default Judgment was entered very expeditiously, but the Wyoming Rules of Civil Procedure were complied with at all times.

Id.

In sum, the Wyoming Supreme Court's opinion reflects a careful, thoughtful analysis of the record, the arguments of Petitioner, and the proper application of Wyoming procedural law to the facts and issues before the court. The appellate court's well-reasoned decision deserves better than the "pro forma review" caricature presented by Petitioner.

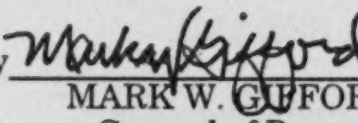
The only conclusion that can be drawn from the foregoing is that there was no infringement upon Petitioner's Due Process rights. Petitioner simply did not carry its burden of satisfying the Wyoming courts that relief from the default judgment was warranted, though it had ample opportunity to do so.

CONCLUSION

No Due Process or other issue of federal law was timely raised by Petitioner before, nor addressed by, the Wyoming Supreme Court. The default judgment was properly granted under the Wyoming Rules of Civil Procedure. In the unanimous view of the Wyoming Supreme Court and the state trial court below, the Petitioner failed in its burden of proving facts necessary to justify relief from the default judgment. Moreover, there was no infringement upon Petitioner's Due Process rights. For these reasons, Respondent requests that the petition be denied.

Respectfully submitted,

DAVID G. SEWARD,
Respondent

By 

MARK W. GIFFORD
Counsel of Record
Attorney for Respondent
P.O. Box 2508
Casper, Wyoming 82602
(307) 265-3265

APPENDIX 1 -- SUMMONS AND RETURN FILED SEPTEMBER 10, 1996

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

FILED
SEP 10 1996
SUE PATE
Clerk of District Court
By s/ Kay Sandfort
Deputy

SUMMONS

TO THE ABOVE-NAMED DEFENDANT—

Fluor Daniel (NPOSR), Inc.
c/o Prentice Hall Corp. System, Registered Agent
1600 Van Lennen
Cheyenne, Wyoming 82001

YOU ARE HEREBY SUMMONED and required to file with the Clerk and serve upon the Plaintiff's attorneys an answer to the Complaint and Jury Demand which is herewith served upon you, within 20 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint and Jury Demand.

DATED this 6th day of September, 1996.

(Seal of District Court)

SUE PATE
Clerk of Court
By: s/ Gen Tuma

Attorney for Plaintiff:

Mark W. Gifford
Gifford & Bonner
243 South Park Street
P.O. Box 2519
Casper, Wyoming 82602
(307) 265-3265

74525
RETURN

STATE OF WYOMING)
:SS.
COUNTY OF LARAMIE)

I, D.J. Hudson, Deputy, Sheriff in and for said County of Laramie, in the State aforesaid, do hereby certify that I received the within Summons, together with a copy of the Amended Complaint filed in the above entitled matter, and that I served the same in the County aforesaid on the 9th day of September, 1996 by delivering a copy of the same, together with a copy of the Complaint and Jury Demand and Plaintiff's First Written Discovery Request, to Ronda Blake (sec. for Prentice-Hall Corp - agent for Fluor Daniel (NPOSR), Inc.), personally and in person at her usual place of employment.

PATRICK C. BARRETT
Sheriff
By: s/ D.J. Hudson
Deputy Sheriff

APPENDIX 2 -- DEPOSITION OF RONDA BLAKE TAKEN NOVEMBER 19, 1996

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

v.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation

Defendant.

DEPOSITION OF: RONDA BLAKE
November 19, 1996

Taken pursuant to Subpoena on behalf of Plaintiff at 1821 Logan Avenue, Cheyenne, Wyoming, at 11:30 a.m., November 19, 1996, before Jacque Wilson, RDR, and a Notary Public.

APPEARANCES

For the Plaintiff: GIFFORD & BONNER
Attorneys at Law
243 South Park Street
Casper, Wyoming 82602
by MARK GIFFORD, ESQ.

For the Defendant: BROWN, DREW,
MASSEY & SULLIVAN
Attorneys at Law
123 West First Street
Suite 800
Casper, Wyoming 82601
By BRUCE WILLOUGHBY,
ESQ.
(Appearing telephonically.)

For Prentice Hall: ORR, BUCHHAMMER & KEHL,
P.C.
Attorneys at Law
1821 Logan Avenue
Cheyenne, Wyoming 82003-0568
By LARRY B. KEHL, ESQ.

INDEX

EXAMINATION OF RONDA BLAKE — PAGE
November 19, 1996

By Mr. Gifford — 3

DEPOSITION EXHIBITS — INITIAL REFERENCE

1 -- Notice of Service of Process — 6

(Attached to original and copy transcripts.)

*****

PROCEEDINGS

(Deposition proceedings convened 11:30 a.m., November 19, 1996.)

(Witness sworn.)

RONDA BLAKE,

being first duly sworn, on her oath testified as follows:

EXAMINATION

BY MR. GIFFORD:

Q. Ronda, would you state your name, please.

A. Ronda Ann Blake.

MR. WILLOUGHBY: Mark?

MR. GIFFORD: Yeah.

MR. WILLOUGHBY: I can hear you fine. I can't hear the people in the background.

MR. GIFFORD: Okay. We'll try to speak up.

MR. WILLOUGHBY: Okay.

Q. (BY MR. GIFFORD) Ronda, we are here in the case captioned David G. Seward vs. Fluor Daniel NPOSR, Inc., and we are here for your deposition pursuant to a subpoena that was served on you last week. Is that right?

A. Yes.

Q. And the reason that I needed to take your deposition is that I had had some discussions with you about service of process in this case. Do you recall those?

A. Yes, I do.

Q. And I requested an affidavit as to the summons and complaint and what you did with it, and you, as I understand it, contacted Prentice Hall, and they cautioned you against giving an affidavit. Is that right?

A. Right.

Q. The question I had -- first of all, the return of service in this case reflects that the summons and complaint was served on Prentice Hall Corporate Systems, and as I understand it, the law office that you work for is the agent for Prentice Hall Corporate Systems here in Wyoming. Is that correct?

A. That's correct.

Q. And the return of service reflects that is was served on the 9th day of September by service upon Ronda Blake, secretary for Prentice Hall Corporation, agent for Fluor Daniel, NPOSR, Inc., personally and in person at her usual place of employment.

Do you recall receiving service of the summons and complaint on that date in this action?

A. Yes, I do.

Q. And what did you do with the summons and complaint upon receipt of it at the office here in Cheyenne?

A. Upon service, I checked on-line with Prentice Hall in our computer to see if we're the registered agency for Fluor Daniel. We were, so I accepted service.

Q. And what did you do with the papers after accepting service?

A. I input the information into the computer.

Q. And what did you do next?

A. I put the information from the computer, the printouts, and the complaint and summons in a Fed Ex envelope, and sent it to Fluor Daniel.

Q. And what address did you use to transmit the summons and complaint to Fluor Daniel by Federal Express?

A. I sent it to 3333 Michelson Drive, Suite 330K, Irvine, California.

Q. Did you send it to anyone's attention?

A. Erin C. Kantor.

Q. K A N T O R?

A. Correct. Legal assistant.

MR. WILLOUGHBY: Mark, she's kind of fading out. Is she reading something?

MR. GIFFORD: Well, she's reading from a -- yes, she is.

Q. (BY MR. GIFFORD) What are you reading from there?

A. From my branch office copy of the service papers.

MR. WILLOUGHBY: Okay.

MR. GIFFORD: Could we make a copy of that and mark it as Exhibit 1 to the deposition, Larry?

MR. KEHL: Sure. Sure.

Q. (BY MR. GIFFORD) Was that Fed Ex sent on the 9th of September, the same day that you received the papers?

A. Yes, it was.

Q. And did you later follow up to confirm that the Fed Ex reached its destination?

A. Yes, I did.

Q. And how did you do that?

A. I looked at my Fed Ex air bill and called 1-800-Go Fed Ex and traced it through the tracking number.

Q. And did you find out what date the Fed Ex package was received by Fluor Daniel?

A. Yes, I did.

Q. And what date was it?

A. September 10th.

Q. That's all I have. Thank you.

A. Okay.

MR. WILLOUGHBY: I have no questions.

MR. GIFFORD: Okay. Bruce, we'll mark the document as Exhibit 1 to the deposition.

MR. WILLOUGHBY: Okay.

MR. GIFFORD: And do you have anything else?

THE DEPONENT: No, I don't.

MR. GIFFORD: Okay. That's it, Bruce.

MR. WILLOUGHBY: Thanks. You'll tell the reporter I need a copy?

(Deposition proceedings concluded 11:35 a.m., November 19, 1996.)

* * * * *

DEPONENT'S CERTIFICATE

I, RONDA BLAKE, do hereby certify that I have read the foregoing deposition taken on November 19, 1996, and that the foregoing transcript and accompanying amendment sheets, if any, constitute a true and complete transcript of my testimony.

s/ Ronda Blake
RONDA BLAKE

(X) No Changes ( ) Changes Attached

Subscribed and sworn to before me this 26th day of November, 1996.

s/ Bonnie L. Crocker
Notary Public

BONNIE L. CROCKER - NOTARY PUBLIC

COUNTY OF LARAMIE (Seal) STATE OF WYOMING

MY COMMISSION EXPIRES MAR. 1, 1998

Address: Cheyenne, Wyoming

My Commission Expires: March 1, 1998

SEWARD v. FLUOR DANIEL/jw

CERTIFICATE

I, JACQUE WILSON, a Registered Merit Reporter, Registered Diplomate Reporter, and a Notary Public, appointed to take the deposition of RONDA BLAKE, do hereby certify that the deponent was by me first duly sworn to testify to the truth under the penalty of perjury; that the deposition was taken by me at 1821 Logan Avenue, Cheyenne, Colorado, on November 19, 1996; that the proceedings were thereafter reduced to typewritten form by means of computer-aided transcription, consisting of 9 pages herein; that the foregoing is an accurate transcript of the proceedings at that time.

I further certify that I am not related to any party herein or their counsel and have no interest in the result of this litigation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal this 19th day of November, 1996.

s/ Jacque Wilson
JACQUE WILSON
Registered Merit Reporter
Registered Diplomate Reporter

NOTARY PUBLIC
JACQUE WILSON
STATE OF COLORADO
(Seal)

My Commission Expires 3/2/2000

APPENDIX 3 -- DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT FILED NOVEMBER 5, 1996

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,

Plaintiff,

vs.

FLUOR DANIEL (NPOSR), INC., a Delaware corporation,

Defendant.

FILED
NOV 05 1996
SUE PATE
Clerk of District Court
By s/ Gen Tuma
Deputy

DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT PURSUANT TO WYOMING RULES OF CIVIL PROCEDURE 55(c) AND 60(b)

COMES NOW Defendant, Fluor Daniel (NPOSR), Inc. ("Defendant"), by and through its undersigned counsel, Brown, Drew, Massey & Sullivan and respectfully shows the Court:

1. A complaint was filed in the above-entitled case on September 6, 1996 and served upon Defendant on September 9, 1996.

2. Service was made on the Prentice-Hall Corporation System, Inc., Defendant's registered agent for service of process in Wyoming.

3. Defendant, as shown by the attached affidavit of Erin Kantor, Fluor Daniel, Inc.'s paralegal, failed to answer or otherwise appear in the case within the time allowed by law as a result of mistake, inadvertence and excusable neglect.

4. Defendant's default was entered on October 2, 1996.

5. Default judgment was entered pursuant to such default on October 7, 1996.

6. The amount of the judgment was entered through misrepresentations of Plaintiff and Plaintiff's expert witness, as shown by the attached affidavit of Lynn Foster, Defendant's Human Resources Supervisor.

7. Defendant has meritorious defenses to the claims contained in Plaintiff's complaint, as shown by the Memorandum Brief filed in support of this Motion.

WHEREFORE, Defendant moves the Court for an Order setting aside the entry of default and the default judgment in the above-entitled case and allowing Defendant to plead and otherwise defend against the claims of Plaintiff, and for such other and further relief as the Court finds to be just.

DATED the 5th day of November, 1996.

FLUOR DANIEL (NPOSR),
INC., a Delaware corporation

By s/Bruce N. Willoughby
DONN J. McCALL
and
BRUCE N. WILLOUGHBY
Brown, Drew, Massey & Sullivan
Casper Business Center
Suite 800
123 West First Street
Casper, Wyoming 82601
(307) 234-1000
Attorneys for Defendant
Fluor Daniel (NPOSR), Inc.

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of November, 1996, the undersigned did serve a true and correct copy of the foregoing instrument on the parties by depositing a copy of same in the U.S. Mail, postage prepaid, properly addresses to:

Mark W. Gifford
Gifford and Bonner
P.O. Box 2519
Casper, WY 82602

s/ Bruce N. Willoughby

APPENDIX 4 -- MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT FILED NOVEMBER 5, 1996

STATE OF WYOMING) IN THE DISTRICT COURT
:SS
COUNTY OF NATRONA) SEVENTH JUDICIAL DISTRICT

Civil Action No. 74525

DAVID G. SEWARD,
Plaintiff,
vs.
FLUOR DANIEL (NPOSR), INC., a Delaware corporation,
Defendant.

FILED
NOV 05 1996
SUE PATE
Clerk of District Court
By s/ Gen Tuma
Deputy

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT PURSUANT TO WYOMING RULES OF CIVIL PROCEDURE 55(c) AND 60(b)

Pursuant to Rule 55(c) and 60(b) of the Wyoming Rules of Civil Procedure, Defendant Fluor Daniel (NPOSR), Inc. ("Defendant"), by and through its attorneys, Brown, Drew, Massey & Sullivan, respectfully submits the Memorandum in support of its Motion, which has been filed in the above-entitled civil action, to set aside the entry of default and de-

fault judgment entered against Defendant by this Court on October 7, 1996.

I. INTRODUCTION

David Seward ("Plaintiff") received an entry of default and default judgment against Defendant, in the amount of $562,044. Defendant allegedly breached an employment contract which it allegedly entered into with Plaintiff. The amount of damages awarded to Plaintiff was supported by affidavits from Plaintiff ("Seward Affidavit") and from a Certified Public Accountant, Mr. Karl M. Killmer ("Killmer Affidavit"). Both affidavits are based upon misrepresentations and false assumptions, and the award of damages in this case is unjust and mistaken. All the elements of a showing of good cause to set aside a default judgment are satisfied by Defendant. Therefore, an order setting aside Plaintiff's default judgment is appropriate under the circumstances of this case.

II. FACTUAL BACKGROUND

On May 1, 1995, Plaintiff signed an application for employment in which he acknowledged that his employment with Defendant was terminable at will, with or without notice, and with or without cause. The application is attached hereto as Exhibit-A and incorporated herein by this reference. On May 17, 1995, Plaintiff signed a Notification of Employment Status ("Notification") acknowledging that his employment was "considered to be temporary due to the business nature of the construction services industry." The Notification is attached hereto as Exhibit B and incorporated herein by this reference. Finally, on May 18, 1995, Plaintiff acknowledged and accepted employment with Defendant by signing

an acceptance of the offer letter which stated, "[a]ll Employment with Fluor Daniel is "At Will" as stated on the application form you filled out." The offer letter is attached hereto as Exhibit C and incorporated herein by this reference.

Plaintiff's complaint alleged that during May of 1996 Plaintiff was terminated without warning or cause. Complaint at ¶ 5 (September 6, 1996). Plaintiff sought an award of damages as a result of Defendant's alleged breach of employment contract. It should be noted that Plaintiff was not terminated by Defendant, and Plaintiff's resignation appeared to be voluntary as Plaintiff stated on May 3, 1996, "[e]ffective today, I resign from my position on the Fluor Daniel (NPOSR) Inc. Casper Project." ("Interoffice Memorandum" attached hereto as Exhibit D and incorporated herein).

Defendant was served with Plaintiff's summons and complaint on September 9, 1996. Under W.R.Civ.P. 12(a), Defendant was required to answer or otherwise defend against Plaintiff's complaint within twenty (20) days. Defendant did not file a timely answer.

Fluor Daniel (NPOSR), Inc. is a wholly-owned subsidiary of Fluor Daniel, Inc.'s offices for receiving service of process, acquiring local counsel, and ensuring that all complaints against Fluor Daniel, Inc. or its subsidiaries are answered timely. Kantor Affidavit ¶ 4 attached hereto as Exhibit E and incorporated herein by this reference. When service of process arrives at Fluor Daniel, Inc.'s offices in California, as it did in this case, the ordinary procedure involves date stamping the documents received and giving them to Fluor Daniel, Inc.'s paralegal, Erin Kantor. Kantor Affidavit ¶ 5. At that point, a file is

created, and a copy of the complaint is given to Fluor Daniel, Inc.'s in-house employment attorney. The action is then entered in Fluor Daniel, Inc.'s computerized docket system, and the paralegal confers with the in-house employment attorney to ensure that arrangements are made for Fluor Daniel, Inc.'s or its subsidiary's representation. Kantor Affidavit ¶ 5.

The standard practice for receiving service of process was in place on September 9, 1996 when Plaintiff served process on Defendant's registered agent for service of process in Wyoming. Kantor Affidavit ¶ 7. In this case, the procedures necessary for answering Plaintiff's complaint failed. However, to the best knowledge of Fluor Daniel, Inc.'s paralegal, Defendant has never failed to answer a complaint which has been properly sreved. Kantor Affidavit ¶ 6.

Fluor Daniel, Inc.'s paralegal first became aware of Plaintiff's complaint on October 17, 1996. Kantor Affidavit ¶ 8. Upon reading the complaint, she immediately initiated steps to respond to the complaint despite the fact that the service of process had not been appropriately date stamped.

Several events which occurred at the time of service or shortly thereafter prevented Defendant from submitting a timely answer due to excusable neglect. On September 10, 1996, the day service of process likely arrived at Fluor Daniel, Inc.'s offices in California, the entire legal staff attended a funeral for the spouse of one of the department's longtime employees. Kantor Affidavit ¶ 9. From September 22, 1996 through September 25, 1996, Fluor Daniel, Inc.'s paralegals and attorneys attended a conference for the legal staff. In addition to requiring her absence during the conference, the confer-

ence required Fluor Daniel, Inc.'s paralegal to spend a substantial amount of time during the week of September 16, 1996 through September 20, 1996 preparing conference materials and making travel arrangements for those planning to attend the conference from outside California. Kantor Affidavit ¶ 10. Finally, on September 30, 1996, the date an answer was due in this case, Fluor Daniel, Inc.'s paralegal reported for and served on jury duty for six (6) consecutive working days. Kantor Affidavit ¶ 11.

In addition to Defendant's excusable neglect, it is clear that the default judgment in this case was entered based upon a misrepresentation of Plaintiff's salary at the time of his alleged termination. In his affidavit, Plaintiff alleges that shortly before his termination, he was told that he would be promoted to the position of "Environmental Coordinator," which he alleged was the position held by Lynette Soehn, his supervisor. Seward Affidavit ¶¶ 2, 6. He alleged that the "Environmental Coordinator," salary grade ranged between $32,424.00 and $51,936.00 per year, while the salary grade he was receiving at the time of his termination ranged from $26,844.00 to $42,840.00 per year. Seward Affidavit ¶¶ 5, 6.

Plaintiff's affidavit is incorrect in at least three critical respects. First, the position of "Environmental Coordinator" does not exist. Foster Affidavit ¶ 3 attached hereto as Exhibit F and incorporated herein by this reference. Second, Plaintiff was never told by any member of Defendant's managerial staff that he would be promoted. Foster Affidavit ¶ 4. Third, even if Plaintiff had been promoted as he alleges, the promotion would have resulted in no change to his pay grade; Plaintiff's hourly wage would have increased by only forty-nine (49) cents

per hour, but only if he was given the same salary as the person who was previously his supervisor. Ms. Soehn's salary at the time she left her employment with Fluor Daniel was $2,321.91 per month ($27,862.92 per year). Foster Affidavit ¶ 7. Plaintiff and the person who he would have replaced in the event of a promotion, Lynette Soehn, had identical job titles and salary grades. They were both classified as Environmental Specialist I. Foster Affidavit ¶ 6. The difference between the maximum salary which Mr. Seward could have received at the time of his alleged termination ($3,570.00 per month) and the salary he claims he would have made in the nonexistent position of "Environmental Coordinator" ($4,328.00 per month) is $758.00 per month. This is a significant difference which contributed to the aberrant figure of lost future wages calculated by Mr. Killmer.

Mr. Killmer based his damages calculations on several factual errors even though he stated in his affidavit that he reviewed the relevant Fluor Daniel salary schedule. Killmer Affidavit ¶ 4. First, the position of "Environmental Coordinator," referred to by Mr. Killmer in his affidavit does not exist, Killmer Affidavit ¶ 5, Foster Affidavit ¶ 3. Second, even if Plaintiff had been promoted as he suggests he would have been, Plaintiff would not have achieved the level of income which Mr. Killmer relied upon in performing his calculations.[1] Third, there is not a single iota of evidence which suggests

---

[1] Even if Plaintiff had been promoted to replace his supervisor, Ms. Lynette Soehn, his position would have remained that of Environmental Specialist I. This position could have given Plaintiff a $.49 per hour raise; however, he would have been left in the same pay grade. Thus, even if he had been promoted, it would not have had the dramatic effect on his future earnings as calculated by Mr. Killmer. Foster Affidavit ¶ 7.

that Plaintiff would have been promoted. Finally, Plaintiff's and Mr. Killmer's affidavits are baldly conclusory in their claim that Plaintiff is entitled to $562,044 for damages suffered as a result of the alleged breach of employment contract, and do not provide sufficient evidence to substantiate their claims for damages incurred.

III. ARGUMENT

Relief from a default judgment is essentially a matter of fairness. Default judgments generally are governed by W.R.Civ.P. 55, and setting aside a default judgment is governed by Rule 55(c). Pursuant to W.R.Civ.P. 55(c), Rule 60 of the Wyoming Rules of Civil Procedure provides a method to set aside a default judgment and allows relief from a final judgment for six categories of reasons. *Whitney v. McDonough,* 892 P.2d 791, 793 (Wyo. 1995). The movant seeking affirmative relief carries the burden of bringing itself within the rule's provisions. *Whitney,* 892 P.2D at 794.

A default judgment may be set aside pursuant to W.R.Civ.P. 55(c) for good cause shown pursuant to the reasons established in W.R.Civ.P. 60. *Lantz v. Bowman,* 881 P.2d 1079, 1081 (Wyo. 1994). Three factors determine whether a motion under W.R.Civ.P. 55(c) should be granted as showing good cause for setting a default judgment aside. Under the three factor test, the district court should consider: (1) Whether the plaintiff will be prejudiced; (2) Whether the defendant has a meritorious defense; and (3) Whether culpable conduct of the defendant led to the default. *Lantz,* 881 P.2d at 1081, *Carlson v. Carlson,* 836 P.2d 297, 301-02 (Wyo. 1992); *First Southwestern Financial Services v. Laird,* 882 P.2d 1211, 1215 (Wyo. 1994).

The default judgment awarded Plaintiff should be set aside, since Defendant clearly satisfies all three requirements for good cause shown under W.R.Civ.P. 55(c) and 60(b).

A. Plaintiff will not be Prejudiced if the Default Judgment is Set Aside.

A motion to set aside a default judgment should not be granted where relief would prejudice the nondefaulting party. 10 WRIGHT, MILLER & KANE, *Federal Practice and Procedure* § 2699 (1983 & Supp. 1996). Mere delay in satisfying a plaintiff's claim, if he should ultimately succeed at trial, is not sufficient prejudice to require the denial of a motion to set aside a default. *Newhouse v. Probert,* 608 F.Supp. 978 (D.C. Mich. 1985). In order to grant the setting aside of a default judgment, it must be shown that delay will result in loss of evidence, create increased difficulties of discovery, or provide greater opportunity for fraud and collusion. *Apache Nitrogen Products, Inc. v. Harbor Insurance Company,* 145 F.R.D. 674 (D.C. Ariz. 1993). Real prejudice is evidenced by the loss of evidence, the unavailability of witnesses, or roadblocks to discovery. *Mathon v. Marine Midland Bank, N.A.,* 875 F.Supp. 986, 993 (D.C.N.Y. 1995).

Requiring a plaintiff to prosecute his case is not to be considered prejudice for purposes of determining good cause under Rule 55(c). *Walter E. Heller Western, Inc. v. Seaport Ent., Inc.,* 99 F.R.D. 36 (D.C.Ore. 1983). Finally, as stated by one commentator, "[b]ut where there are no intervening equities **any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a final trial upon the merits."**

6 James W. Moore, *Moore's Federal Practice,* ¶ 55.10[1] at 55-79 (1996) (emphasis added).

In *First Southwestern Financial Services,* the Wyoming Supreme Court found that a nondefaulting party was not prejudiced where a default judgment was set aside and the nondefaulting party did not rely upon the entries of default to its detriment. *First Southwestern Financial Services,* 882 P.2d at 1215. Similarly, setting aside the default judgment in this case would not prejudice Plaintiff. Because little time has elapsed between the filing of the complaint and the Motion before the Court, Plaintiff has not relied to his detriment upon the default judgment.

In this case, Defendant's answer was filed on October 29, 1996, only 29 days after it was originally due. Therefore, Defendant's default is largely technical. See *Mathon v. Marine Midland Bank, N.A.,* 875 F.Supp. 986 (D.C.N.Y. 1995) (holding that a several week delay at beginning of suit was not sufficiently prejudicial to set aside a default). There is no possibility of prejudice to Plaintiff with regard to stale evidence or unavailability of witnesses. Plaintiff is not prejudiced by the mere fact that he would have to prosecute his case if the default judgment is set aside. In addition, all of Plaintiff's discovery requests were voluntarily satisfied and answered as of November 1, 1996. Therefore, the dangers of stale evidence, increased difficulty in discovery, or potential for fraud or collusion have been eliminated.

B. Defendant has Meritorious Defenses.

In accordance with the provisions of W.R.Civ.P 55(c) and 60(b), to set aside a default judgment, one of the factors that must be proven is

that the person against whom the default judgment was entered has a meritorious defense to the claims of the judgment holder.

In the instant case, Plaintiff's complaint alleges the following:

1. In May of 1995, Plaintiff and Defendant entered into a binding contract of employment which entitled Plaintiff to full time employment at an annual salary of approximately $26,650.00.

2. One of the terms of Plaintiff's contract of employment with Defendant was that his employment would not be terminated without cause.

3. By terminating his employment without cause, Defendant breached its employment contract with Plaintiff.

1. Plaintiff's First Allegation has No Merit.

On May 15, 1995, an offer letter was sent to Plaintiff. This offer letter expanded the terms of the May 1, 1995 written contract entered into between Plaintiff and Defendant. The terms of the contract entered into on May 1, 1995 were expanded to include Plaintiff's job title; Plaintiff's monthly base salary, stated on a bi-weekly basis; the date Plaintiff was to report to work; notification that Plaintiff must provide sufficient identification under the Immigration Reform and Control Act of 1986; notification that Plaintiff must pass a drug screen; notification that the existence of Plaintiff's position might be affected by the re-engineering of the federal government; and reaffirming that all employment with Defendant is at will as stated in the application form.

It should be noted there is no mention of annual salary nor full time employment in the offer letter.

The May 15, 1995 letter, which expanded the terms of the contract entered into on May 1, 1995, was signed by a representative of Defendant and by Plaintiff as required by the terms of their May 1, 1995 contract.

2. Plaintiff's Second Allegation has No Merit.

On May 1, 1995, Plaintiff signed an application for employment with Defendant that contained the following statement above Plaintiff's signature:

> *I also understand and agree that any employment of me by Fluor Daniel is terminable at will by either Fluor Daniel or me, with or without notice and with or without cause, that any changes to this agreement will not be valid unless in writing signed by me and a duly authorized representative of Fluor Daniel and that this is intended to be a contract and a final expression of our agreement concerning this matter.* See Exhibit A attached hereto.

On May 1, 1995, the terms of the contract between Plaintiff and Defendant as to the status of Plaintiff's employment were contained in the above statement.

In *Reid v. Sears Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), the Court held that unequivocal language in an employment application created a contract for at-will employment. See also *Alstad v. Of-*

fice Depot, 10 Indiv. Empl. Rts. Cas. 689 (BNA) (N.D. Cal. Feb. 7, 1995), where the Court found an employee had no claim for breach of contract where employment policies indicated at will employment.

In *Duart v. FMC Corp.,* 859 F.Supp. 1447, 1449 (D. Wyo.) affirmed 72 F.3d 117, 120 (10th Cir. 1995), the Court, applying Wyoming Law, held that where employment documents stated that an employee's employment was "at will" there is no cause of action for breach of contract. This was despite the fact that some of the documents discussed disciplinary and termination policies of the employer.

The language in the application for employment that Plaintiff signed could not be more specific that all employment at Defendant is at will. Defendant reserved the right to terminate Plaintiff at any time and for no reason. Plaintiff accepted employment under these terms.

3. Plaintiff's Third Allegation has No Merit.

In *Wilder v. Cody Country Chamber of Commerce,* 865 P.2d 211 (Wyo. 1994), the Wyoming Supreme Court stated: "Wyoming continues to accept the common-law employment at will rule which states that either party may terminate a contract of employment, which is for an indefinite duration, at any time, for any reason or no reason at all." The Court reaffirmed that position in *Drake v. Cheyenne Newspapers, Inc.,* 891 P.2d 80, 81 (Wyo. 1995) with the following unequivocal statement:

> Wyoming is an at-will employment state, which means that when an employment is for an indefinite period of

> time, either party may terminate the employment relationship at any time and for any reason, or for no reason at all.

The express terms of the contract that was entered into between the parties specifically state that Plaintiff's employment is at will and may be terminated by either party at any time and for any or no reason.

Courts that have addressed how the terms of express employment contracts effect termination of at will employees, have found that the employee must prove that he and his employer had a contract which specifically prohibited the employer from terminating the employee at will. *Moulton v. City of Beaumont,* 991 F.2d 227, 230 (5th Cir. 1993). See also *Zimmerman v. H.E. Butt Grocery Co.,* 932 F.2d 469, 471 (5th Cir.), cert denied 502 U.S. 984 (1991).

In *Webber v. M.W. Kellogg Co.,* 720 S.W.2d 124, 127 (Tex. App. 1987), the Court held that to establish a cause of action for wrongful discharge, the discharged employee must prove the written employment agreement specifically provided that the employer did not have the right to terminate the employee.

In the instant employment relationship, the written employment contract specifically provides that the employer has the right to terminate Plaintiff at any time and without reason. There are no other documents signed by both a duly authorized representative of Defendant and Plaintiff which alter the at will status of Plaintiff's employment. The necessity for a document, signed by both a representative of Defendant and Plaintiff, to alter the terms

of the contract, is an express term of the contract between Plaintiff and Defendant.

C. Defendant's Conduct was not Sufficiently Culpable to Justify an Award of Default Judgment.

In considering entries of default and default judgments, culpable conduct is defined as "willful neglect or intentional failure." *Lantz v. Bowman,* 881 P.2d 1079 (Wyo. 1994), see also *First Southwestern Financial Services v. Laird,* 882 P.2d 1211 (1994). In this case, Defendant has not acted either willfully or intentionally. Upon reading Plaintiff's complaint, Defendant immediately initiated steps to respond. Kantor Affidavit ¶ 8. In fact, Defendant filed its answer on October 29, 1996 and voluntarily responded to Plaintiff's discovery requests on November 1, 1996.

1. Defendant's Failure to Timely File an Answer was the Result of Excusable Neglect.

Wyoming Rule of Civil Procedure 60(b)(1) allows for a default judgment to be set aside upon a showing that the default resulted from mistake, inadvertence, surprise, or excusable neglect. The rule is remedial and is to be liberally construed. *Spomer v. Spomer,* 580 P.2d 1146, 1149 (Wyo. a1978), Furthermore, Rules 55(c) and 60(b) are, "intended to promote decisions on the merits when possible." *Carlson v. Carlson,* 836 P.2d 297, 301 (Wyo. 1992). Excusable neglect has been defined as such behavior as might be the act of a reasonably prudent person under the circumstances. *Carlson,* 836 P.2d at 303; *Booth v. Magee Carpet Co.,* 548 P.2d 1252, 1255 (Wyo. 1976).

A standard practice existed at Fluor Daniel, Inc. for receiving and responding to service of process. Kantor Affidavit ¶¶ 4-6. This standard practice was in place when Plaintiff served Defendant on September 9, 1996. Although an answer was not timely filed, Defendant, upon becoming aware of Plaintiff's complaint, acted diligently and swiftly to answer the complaint and all of Plaintiff's discovery requests. Kantor Affidavit ¶ 8. Furthermore, as already discussed, Plaintiff will suffer no prejudice upon the setting aside of the default judgment. Because Defendant's failure to timely answer Plaintiff's complaint was the result of excusable neglect, it is appropriate for this Court to set aside the default judgment entered against Defendant.

2. Misrepresentation of Plaintiff's Damages Justifies Setting Aside the Default Judgment.

Wyoming Rules of Civil Procedure 60(b) and 60(b)(3) state that, "[o]n motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party." Defendant's motion for setting aside the default under Rule 60(b)(3) need not allege intentional misrepresentation on the part of Plaintiff or Mr. Killmer. Defendant must show, however, that the judgment was entered mistakenly and that an unjust result occurred. *Lonsdorf v. Seefeldt,* 47 F.3d 893, 897 (7th Cir. 1995) (stating, "Fed.R.Civ.P. 60(b)(3) applies to both intentional and unintentional misrepresentations."); *Plattner v. Strick Corp.,* 102 F.R.D. 612, 614 (E.D.Ill. 1984) (stating, "Rule

60(b)(3) applies in situatiōns in which the testimony amounted to either innocent or deliberate misrepresentation."); *In re Halladay Enterprises, Inc.*, 5 B.R. 83, 86 (Bankr. S.D. Tex. 1980) (stating, "Relief under Rule 60 is not dependent upon a showing of deliberate falsehood in regard to misrepresentation.").

In *Lonsdorf,* for example, the Seventh Circuit held that F.R.Civ.P. 60(b)(3) applies to both intentional and unintentional misrepresentations. *Lonsdorf,* 47 F.3d at 897. Ultimately the Court held that plaintiff was entitled to relief from a judgment partially based upon an incorrect and forged document. *Id.* In another case, the Fifth Circuit held that relief under Rule 60(b) was appropriate even where the misrepresentation, an incorrect affidavit, was not proven to be the result of a deliberate or knowingly false statement of fact. *Bros Inc. v. W. E. Grace Mfg. Co.,* 351 F.2d 209, 211 cert denied 383 U.S. 936 (1966).

In Wyoming it has been stated by the Supreme Court: "Rule 60(b) provides courts with the **means of relieving a party** from the oppression of a final judgment or order on a proper showing **where such judgment is unfairly or mistakenly entered."** *S.C. Ryan, Inc. v. Lowe,* 753 P.2d 580, 582 (Wyo. 1988) (emphasis added). Furthermore, Wyoming law does not favor default judgments; decisions on the merits are preferred when the rules of civil procedure will allow for them. *Claassen v. Nord,* 756 P.2d 189, 193 (Wyo. 1988).

In a case similar to the instant action, the Wyoming Supreme Court ruled that a default judgment should be set aside. *Halberstam v. Cokeley,* 872 P.2d 109 (Wyo. 1994). The Court held that where the plaintiffs could not point to a single iota of

evidence establishing the fair market value of a piece of land for which they were awarded damages, the district court had abused its discretion in determining that the damages were liquidated and entering a default judgment. *Halberstam,* 872 P.2d at 113.

As in *Halberstam,* the damages in the instant action were determined based upon the bald assertions of Mr. Killmer and of Plaintiff; namely, that Plaintiff was on the verge of a promotion to the position of "Environmental Coordinator," the position of "Environmental Coordinator" existed, and that an "Environmental Coordinator's" salary grade was higher than Plaintiff's salary grade at the time of his termination. These assertions are patently false. Furthermore, these assertions have not been supported by anything other than Plaintiff's own statements.

Plaintiff has produced insufficient evidence to meet his burden of proving the amount of his damages and has relied upon misrepresentations in their calculation. *See Halberstam,* 872 P.2d at 113. As a result of these serious misrepresentations, which have resulted in an unjust and mistaken judgment, the default judgment should be set aside so that the parties may proceed to a trial on the merits.

3. Reasons Other than Misrepresentation and Excusable Neglect Justify Setting Aside the Default Judgment.

Wyoming Rule of Civil Procedure 60(b)(6) allows for a judgment to be set aside where in the Court's discretion there is any reason which justifies relief from the operation of the judgment. There are

two reasons which justify setting aside the default judgment entered against Defendant.

First, a default judgment of $562,044 is too large to overcome the strong policy in favor of decisions based upon the merits of each individual case rather than upon a technical default. *See Eitel v. McCool,* 782 F.2d 1470, 1471 (9th Cir. 1986) (stating that one factor to be considered in deciding whether or not to set aside a judgment is the amount of money at stake). Furthermore, matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be resolved in favor of the petition to set aside the judgment. *Hutton v. Fisher,* 359 F.2d 913, 916 (3d Cir. 1966) citing *Tozer v. Charles A. Krauser Milling Col,* 189 F.2d 242, 245 (3d Cir. 1951).

Plaintiff's judgment is too large to be determined according to default procedures. It is also based upon factual assumptions which are clearly subject to challenge and are misleading. Plaintiff will suffer no prejudice solely by being required to prosecute his case on the merits. Finally, "[w]here the judgment demanded is large, or implicates important public policies, judgment on the merits is strongly favored." 6 James W. Moore, *Moore's Federal Practice,* ¶ 55.10[2] at 55-83 to 55-84 (1996).

Second, in rendering his opinion, Mr. Killmer relied upon speculative facts and data which are inappropriate under Wyoming's Rules of Evidence. W.R.E. 703, which is identical to the federal rule, states:

> The facts or data in the particular case upon which an expert bases an opinion

> or inference may be those perceived by or made known to him at or before the hearing. If of a type **reasonably relied upon by experts in the particular field** in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. W.R.E. 703 (emphasis added).

An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record. *Tyger Construction Co., Inc. v. Pensacola Construction Co.*, 29 F.3d 137, 142 (4th Cir. 1994); *Cf. Reese v. Dow Chemical Co.*, 728 P.2d 1118 (Wyo. 1986) (holding that an expert's testimony was admissible; however, the expert's opinion was grounded on facts submitted in the trial record. Thus, the expert's reliance was reasonable). An expert's opinion as to damages must be causally related to the alleged harm. *Tyger Construction Co., Inc.*, 29 F.3d at 142. Mr. Killmer's testimony is based upon speculative facts provided solely by Plaintiff himself. This does not meet the standard of reasonable reliance required under W.R.E. 703. As a result, a default judgment based upon this type of speculative and mistaken evidence should be set aside under W.R.Civ.P. 60(b)(6).

IV. CONCLUSION

WHEREFORE, Defendant respectfully moves the Court that the entry of default and default judgment entered in favor of Plaintiff be set aside in accordance with W.R. Civ.P. 55(c) and 60(b), and that the parties proceed forthwith to a trial on the merits. In the alternative, Defendant moves the Court to grant Defendant a hearing to determine

Plaintiff's actual damages suffered as a result of the alleged breach of employment contract.

DATED the 5th day of November, 1996.

FLUOR DANIEL (NPOSR),
INC., a Delaware corporation

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CERTIFICATE OF SERVICE

This is to certify that on the 5th day of November, 1996, the undersigned did serve a true and correct copy of the foregoing instrument on the parties by depositing a copy of same in the U.S. Mail, postage prepaid, properly addressed to:

Mark W. Gifford
Gifford and Bonner
P.O. Box 2519
Casper, WY 82602

s/ Bruce N. Willoughby

APPENDIX 5 -- APPELLANT'S BRIEF
FILED FEBRUARY 28, 1997

IN THE SUPREME COURT
STATE OF WYOMING
FILED
FEB 28 1997
JUDY PACHECO, CLERK
s/ Carol Thompson
by DEPUTY

IN THE SUPREME COURT
STATE OF WYOMING

FLUOR DANIEL (NPOSR), INC., a Delaware corporation, Appellant	)	
vs.	)	No. 97-18
DAVID G. SEWARD, Appellee	)	

APPELLANT'S BRIEF

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I. STATEMENT OF THE ISSUES

1. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant where appellee had fraudulently misrepresented the amount of damages to which he was allegedly entitled.

2. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant as required by public policy.

3. Whether the district court erred in not setting aside the entry of default and default judgment entered against appellant where its failure to timely answer the complaint was the result of excusable neglect.

II. STATEMENT OF THE CASE

A. Nature of the Case.

Relief from a default judgment is a matter of fairness. Fairness demand relief from a default judgment of $562,489.00, where the amount of the judgment was based upon blatant misrepresentations of fact. Appellee David G. Seward ("Seward") was an at-will employee of Appellant Fluor Daniel (NPOSR), Inc. ("Fluor Daniel"). During May of 1996, Seward voluntarily resigned. Four months later, he sued Fluor Daniel for wrongful termination. Fluor Daniel inadvertently missed the twenty (20) day answer deadline, and on the twenty-third day Seward obtained an entry of default. R. At 8, 11. He then sought to exploit the default by claiming $562,489.00 in damages, basing his calculation upon a salary higher than he had ever received, and upon his promotion to a ficti-

tious salary grade which did not (and does not) exist. R. At 12, 12A, 15. Fluor Daniel moved to set aside the entry of default and default judgment, to no avail. R. At 53, 55, 241, 243. A default, however, is not a license to exploit a defendant. Fairness demands the default be set aside.

B. Course of Proceedings.

On September 6, 1996, Seward filed a wrongful termination action against Fluor Daniel (the "Complaint"). R. at 4. Process was served on September 9, 1996, by personal service upon Prentice Hall Corporation System, Inc. ("Prentice Hall"), Fluor Daniel's registered agent for service of process in Cheyenne, Wyoming. R at 205-208. On the same day, Prentice Hall sent the Summons and Complaint via Federal Express to Fluor Daniel, Inc. in Irvine, California. Fluor Daniel is a wholly owned subsidiary of Fluor Daniel, Inc. R. at 100.

Despite Fluor Daniel, Inc.'s standard practice for receiving process and ensuring that complaints are timely answered, Fluor Daniel did not timely file an answer in this case. When Fluor Daniel, Inc.'s paralegal first became aware of Seward's Complaint, Fluor Daniel, Inc. Immediately acted to retain local counsel and answer Seward's claim. R. at 101. Fluor Daniel, Inc.'s staff members responsible for tracking service of process were extremely busy at the time Seward's Summons and Complaint arrived. R. at 101-02. Due to a clerical error, the Complaint was not date stamped. R at 101. As a result, it was not given first priority. R. at 101.

According to Wyoming Rule of Civil Procedure 12(a), Fluor Daniel was required to answer the Complaint within twenty (20) days of service of process.

On October 2, 1996, three (3) days after the deadline to answer the Complaint, the Clerk of Court for the Seventh Judicial District Court entered Fluor Daniel's default upon Seward's motion for failure to answer timely. R. at 8, 11. On October 7, 1996 Seward filed a motion for entry of default judgment. R at 12. Attached to the motion for entry of default judgment were two affidavits. These affidavits were from Seward and an accountant, Karl M. Killmer. R. at 12A, 16. Seward's accountant alleged damages in the sum of $562,044.00 R. at 19. On October 7, 1996, the district court granted Seward a default judgment for $562,498.00. R. at 24. Seward made no further showing regarding liability or damages.

On October 24, 1996, Stephenson D. Emery of Williams, Porter, Day & Neville, P.C. entered his appearance as counsel of record for Fluor Daniel. R. at 25. On October 28, 1996, Donn J. McCall and Bruce N. Willoughby of Brown, Drew, Massey & Sullivan entered their appearance as counsel of record for Fluor Daniel and replaced Mr. Emery. R. at 40, 41. Thereafter, Fluor Daniel filed its motion to vacate the entry of default and default judgment. R. at 53, 55.

C. Disposition of the Trial Court.

On December 3, 1996, Judge Spangler issued his decision letter denying Fluor Daniel's motion to set aside the entry of default and default judgment, which was reduced to an order filed December 12, 1996. R. at 241, 243.

On December 27, 1996, Fluor Daniel timely filed it notice of appeal and related documents. R. at 247, 276, 278, 280, 282, 285.

D. Statement of the Facts.

On May 1, 1995, Seward signed an application for employment in which he fully and readily acknowledged that his employment with Fluor Daniel could be terminated at-will, with or without notice, and with or without cause. R. at 73-75. On May 17, 1995, Seward signed a notification of employment status, which also acknowledged that his employment was "considered to be temporary due to the business nature of the construction services industry." R. at 76. Finally, on May 18, 1995, Seward acknowledged and accepted employment with Fluor Daniel by signing an acceptance of an offer letter which stated, "[a]ll employment with Fluor Daniel is "At-will' as stated on the application form you filled out." R. at 77.

Seward alleged he was wrongfully terminated. He sought damages for breach of an alleged employment contract. R. at 4. In fact, Seward was not terminated. Seward voluntarily resigned. He stated in a written, signed memorandum on May 3, 1996, [e]ffective today, I resign from my position on the Fluor Daniel (NPOSR), Inc. Casper Project." R. at 78.

Nevertheless, the district court awarded Seward a default judgment. The judgment was based upon Seward's misrepresentation of his projected salary had he worked for Fluor Daniel until age 65. R. at 18. In his affidavit, submitted in support of his motion for default judgment, Seward alleged that he would be promoted to the position of "Environmental Coordinator," with a pay grade between $32,424.00 and $51,936.00 per year. R. at 14, 15. Seward's damage calculations were based on the alleged salary grade for this fictitious "Environmental Coordinator" position. R at 17. In reality, Seward only worked twelve (12) months at Fluor Daniel. R. at 14. His

salary at the time he resigned from Fluor Daniel was $27,862.92 per year. R. at 83. This was at the low end of his salary grade, which ranged from $26,844.00 to $42,840.00 per year. R. at 14, 15, 83.

The information Seward presented in his affidavit is false in three critical respects. First, the position of "Environmental Coordinator" has never existed within Fluor Daniel's pay structure. R. at 82. Second, Seward was never told by any member of Fluor Daniel's managerial staff that he would be promoted to any position. R. at 235. Third, even if Seward had been promoted, the promotion would have resulted in, at best, a minimal change in his pay and no change in his pay grade. R. at 82-83.

Seward's supervisor made $27,862.92 per year when she left Fluor Daniel in the Spring of 1996. R. at 82-83. If Seward had been promoted to his supervisor's position and salary, his hourly wage would have increased by only forty-nine (49) cents per hour, not the dramatic increase Seward asserts based upon his alleged promotion to "Environmental Coordinator." R. at 83-85. Seward's misrepresentation overstated his damages by at least $758.00 per month.[1] R. at 85. This error is compounded by the fact that Seward's accountant calculated Seward's damages on the assumption that Seward would work twenty-two (22) more years at Fluor Daniel and receive regular wage increases, not enjoyed by any other Fluor Daniel employee. R. at 12A, 18, 234.

Seward's accountant stated that "at the time of termination, Mr. Seward was on the verge of promotion to the position of environmental coordinator." He further stated that "[a]ccording to Fluor Daniel's

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[1] This represents the difference between the maximum salaries for the different pay grades. R. at 85

salary schedule for this position, the minimum salary is $2,702.00 per month, and the maximum salary if $4,328,00 per month." R. at 17. These statements were both unsupported and false. Fluor Daniel's salary schedule does not contain such a range for Seward's pay grade. R. at 82, at Exhibit F-4. In addition, a salary grade for "Environmental Coordinator" did not (and does not) exist. R. at 82. Seward was not on the verge of a promotion to the position of "Environmental Coordinator" or to any other position. R. at 235.

Seward's accountant also stated, "Mr. Seward told me that he could reasonably expect to begin the position at the low end of this scale and advance to the high end over a five-year period." R. at 17. Mr. Ned Clinton Edwards, Fluor Daniel's Environment, Safety, Health and Security Manger of four (4) years, was Seward's superior. R. at 234. He stated that, "no employee at Fluor Daniel (NPOSR), Inc. has ever received a salary increase in every year for four consecutive years." R. at 234.

Even after Fluor Daniel moved to set aside the entry of default and default judgment, Seward continued to assert that the "Environmental Coordinator" position existed and had a salary range of $32,424.00 to $51,963.00. R. at 135. Seward knew that his assertions were blatantly false given the salary schedule attached to Fluor Daniel's motion to set aside the default. R. at 84-94.

III. ARGUMENT

A. Summary.

Seward will not be prejudiced if the entry of default and default judgment are set aside. Fluor Daniel

has done nothing to interfere with Seward's ability to proceed on the merits. At best, Seward had an at-will employment agreement with Fluor Daniel. Accordingly, Fluor Daniel has a meritorious defense to Seward's sole claim for breach of contract. In addition, Fluor Daniel took immediate action to remedy its failure to answer the Complaint upon discovering its error.

After Seward jumped at the opportunity to obtain an entry of default, Seward attempted to bolster his damages for purposes of a default judgment. In doing so, he fraudulently misrepresented the nature of his employment and his compensation. Seward received a judgment for over half a million dollars. Such a judgment is too substantial to be determined according to default procedures, especially where the calculations rely upon pure speculation.

Fluor Daniel failed to answer timely in this case as a result of a clerical mistake. Such a mistake is excusable neglect and does not justify an award of default judgment where resolution on the merits is preferred. Moreover, even if the Court finds that Fluor Daniel must accept the entry of default, the Court should use its equitable power to impose conditions which are less drastic. This should be accomplished by allowing Fluor Daniel to challenge Seward's damage calculations.

B. Standard of Review.

The standard of review to determine whether a motion to set aside an entry of default and default judgment under W.R.Civ.P. 55(c) and 60(b) was properly denied, is whether or not the district court abused its discretion. *Claassen v. Nord*, 756 P.2d 189, 193 (Wyo. 1983); *Spitzer v. Spitzer*, 777 P.2d 587, 592

(Wyo. 1989); *Whitney v. McDonough*, 892 P.2d 791, 794 (Wyo. 1995).

C. The District Court's Entry of Default and Default Judgment Should be Set Aside Pursuant to W.R.Civ.P. 55(c) and 60(b) and Seward's claim Should be Heard on the Merits.

Relief from a default judgment is a matter of fairness. Pursuant to W.R.Civ.P. 55(c) and 60(b), relief from an entry of default may be granted after a defendant shows good cause. In addition to the showing of good cause, relief from a default judgment may be granted where the defendant proves that the default judgment was entered for any one of six categories of reasons. *Vanasse v. Ramsey*, 847 P.2d 993, 999 (Wyo. 1993); *Whitney v. McDonough*, 892 P.2d 791, 793 (Wyo. 1995). The categories are: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) Newly discovered evidence; (3) Fraud; (4) Void judgments; (5) Judgments which are satisfied, reversed, otherwise vacated, or no longer equitable to enforce prospectively; and (6) Any other reason justifying relief from the operation of the judgment.

The three predominant factors considered to determine whether good cause is shown are: (1) Whether the plaintiff will be prejudiced; (2) Whether the defendant has a meritorious defense; and (3) Whether culpable conduct of the defendant led to the default. *Lantz v. Bowman*, 881 P.2d 1079, 1081 (Wyo. 1994); *Carlson v. Carlson*, 836 P.2d 297, 301-02 (Wyo. 1992); *First Southwestern Financial Services v. Laird*, 882 P.2d 1211, 1215 (Wyo. 1994). The movant seeking affirmative relief carries the burden of bringing itself within these rules. *Whitney*, 892 P.2d at 794.

The district court's discretion in proceeding to set aside a default judgment is not unbounded or unrestrained. A district court's discretion "is a composite of may things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously." *Martin v. State*, 720 P.2d 894, 897 (Wyo. 1986). As noted by this Court, "[j]udicial discretion is necessarily broad-but it is not absolute. Abuse occurs when a · ıterial *factor deserving significant weight is ignored, when an improper factor is relied upon, or when all proper and not improper factors are assessed, but the court makes a serious mistake in weighing them.*" *Vanasse v. Ramsey*, 847 P.2d 993, 996 (Wyo. 1993) (citing *Coon v. Grenier*, 867 F.2d 73, 78 (1st Cir. 1989)) (emphasis added).

The default judgment awarded Seward in this case must be set aside because Fluor Daniel clearly satisfied all three factors of good cause under W.R.Civ.P. 55(c) and 60(b). Furthermore, Fluor Daniel carried its burden of proof for setting aside the default judgment based upon three of the six categories enumerated in Rule 60(b).

1. Seward will not be Prejudiced if the Default Judgment is Set Aside.

A motion to set aside a default judgment should be granted where relief would not prejudice the nondefaulting party. Mere delay in satisfying Seward's claim, if he should ultimately succeed at trial, is no sufficient prejudice to require the denial of a motion to set aside a default. *Newhouse v. Probert*, 608 F.Supp. 978 (W.D. Mich. 1985). Prejudice is not suffered by a plaintiff who is required to prove his case. *Walter E. Heller Western, Inc. v. Seaport Ent., Inc.*, 99 F.R.D. 36

(D. Ore. 1983). "[W]here there are no intervening equities any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a final trial upon the merits." 6 J. Moore, *Moore's Federal Practice*, ¶ 55.10[1] at 55-79 (1996).

Prejudice must cause an inability to proceed due to stale evidence, lost witnesses, loss of evidence, increased difficulties of discovery, or greater opportunity for collusion. *Apache Nitrogen Products, Inc. v. Harbor Ins. Co.*, 145 F.F.D. 674 (D. Ariz. 1993); *Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986, 993 (E.D.N.Y. 1995).

In *First Southwestern*, this Court found that a nondefaulting party was not prejudiced where a default judgment was set aside and the nondefaulting party did not rely upon the entries to its detriment. *First Southwestern*, 882 P.2d at 1215. Similarly, setting aside the default judgment in this case would not prejudice Seward. Little time elapsed between the filing of the Complaint and the motion to set aside the default judgment. Indeed, Seward obviously jumped at the chance to default Fluor Daniel three days after an answer was due. R. at 8. There is no evidence that Seward relied to his detriment upon the default judgment.

In this case, Fluor Daniel's answer was filed October 29, 1996, twenty-nine (29) days after it was originally due. R. at 27. Therefore, Fluor Daniel's default was largely technical. *See Mathon v. Marine Midland Bank, N.A.*, 875 F.Supp. 986 (E.D.N.Y. 1995) (holding that a several week delay at beginning of suit was not sufficiently prejudicial to deny a motion to set aside a default). There is no prejudice to Seward with regard to stale evidence or unavailability of witnesses. Seward will not be prejudiced by the

mere fact that he will have to prosecute his case if the default judgment is set aside. Fluor Daniel answered Seward's discovery requests as of November 1, 1996. Seward proceeded to take depositions as if the suit was still pending despite the default. R. at 202-220, 307. Therefore, the dangers of stale evidence, increased difficulty in discovery, or potential for fraud or collusion have been eliminated.

2. Fluor Daniel has Meritorious Defenses.

Seward was an at-will employee who could be terminated with or without cause. Accordingly, Fluor Daniel has a meritorious defense to Seward's single claim of breach of contract.

a. Seward Had No Employment Contract for Continued Employment.

On May 15, 1995, Fluor Daniel sent a letter offering employment to Seward. R. at 77. The offer letter contained terms regarding salary and other administrative information. R. at 77. The letter specifically stated that all employment was at-will. R. at 77. The letter did not guarantee Seward employment terminable only for cause. R. at 77. If this letter is construed as an employment contract, it is a contract that did not guarantee Seward employment.

b. Seward was an At-will Employee.

On May 1, 1995, Seward signed an application for employment with Fluor Daniel that contained the following statement above Seward's signature:

> *I also understand and agree that any employment of me by Fluor Daniel is terminable at-will by either Fluor Daniel or me, with or without notice and with or without cause, that any changes to this agreement will not be valid unless in writing signed by me and a duly authorized representative of Fluor Daniel and that this is intended to be a contract and a final expression of our agreement concerning this matter.*

R. at 75 (emphasis added).

In *Reid v. Sears Roebuck & Co.*, 790 F.2d 453 (6th Cir. 1986), the United States Sixth Circuit Court of Appeals held that similarly unequivocal language in an employment application created a contract for at-will employment. *See also, Alstad v. Office Depot*, 10 Indiv. Empl. Rts. Cas. 689 (BNA) (N.D. Cal. Feb. 7, 1995) (holding that an employee had no claim for breach of contract where employment policies indicated at-will employment).

In *Duart v. FMC Corp.*, 859 F.Supp. 1447, 1449 (D. Wyo.), affirmed 72 F.3d 117, 120 (10th Cir. 1995), the United States District Court for the District of Wyoming, applying Wyoming law, held that when employment documents state that an employee's employment was "at-will," there is no cause of action for breach of contract. This is true even though some of the documents discussed disciplinary and termination policies of the employer. *Id.* Specific provisions for at-will employment are enforced in Wyoming. *Loghry v. Unicover Corp.*, 927 P.2d 706 (Wyo. 1996)

The language in Seward's application could not have been more specific. His employment at Fluor Daniel was at-will, and he had no rights to promotions or pay increases. *City Council of Laramie v. Kreiling*, 911 P.2d 1037 (Wyo. 1996). Fluor Daniel reserved the right to terminate Seward at any time and without any reason. Seward accepted employment under these terms. R. at 75, 76, 77.

c. Seward Could Be Terminated Without Cause.

"Wyoming continues to accept the common-law employment at-will rule which states that either party may terminate a contract of employment, which is for an indefinite duration, at any time, for any reason or no reason at all." *Wilder v. Cody Country Chanber of Commerce*, 868 P.2d 211, 217 (Wyo. 1994). The Court recently and unequivocally reaffirmed this position:

> Wyoming is an at-will employment state, which means that when employment is for an indefinite period of time, either party may terminate the employment relationship at any time and for any reason, or for no reason at all.

Drake v. Cheyenne Newspapers, Inc., 891 P.2d 80, 81 (Wyo. 1995).

Other courts have addressed how the terms of employment contracts affect an employer's ability to terminate at-will employees. They have found that an employee alleging breach of contract must prove that the contract specifically prohibited the employer from terminating the employee at-will. *Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993);

See also, Zimmermann v. H.E. Butt Grocery Co., 932 F.2d 469, 471 (5th Cir.), *cert. denied* 502 U.S. 984 (1991); *Webber v. M.W. Kellogg Co.*, 720 S.W.2d 124, 127 (Tex. App. 1987).

In this case, the written employment contract specifically provided that the employer had the right to terminate Seward at any time and without reason. R. at 77. A document signed by a representative of Fluor Daniel and Seward was necessary to alter the agreement between Seward and Fluor Daniel. R. at 75. No such document was signed by Fluor Daniel and Seward. Thus, there was no modification of the employment contract. Fluor Daniel has a valid and meritorious defense to Seward's claim.

3. Fluor Daniel's Default was not the Result of Culpable Conduct.

Fluor Daniel has not acted either willfully or intentionally with respect to filing its answer timely. Upon reading Seward's Complaint, Fluor Daniel immediately initiated steps to respond. R. at 80.

In considering entries of default and default judgments, culpable conduct is defined as "willful neglect or intentional failure." *Lantz*, 881 P.2d at 1082 (Wyo. 1994); *see also, First Southwestern*, 882 P.2d at 1215. Fluor Daniel has not acted willfully or intentionally. This Court in *Vanasse* held that the defendant had acted culpably only upon a showing that the defendant's claims representative of nine years, who had been given notice of the Complaint and the names of potential defense counsel in Wyoming, acted casually and carelessly in handling the service of process. *Vanesse*, 847 P.2d at 994, 998.

Although Fluor Daniel cannot dispute that it failed to file its answer timely in this case, it has not acted casually. A clerical error caused Fluor Daniel, Inc.'s failure to obtain local counsel, not the casual or careless conduct of its employees. R. at 80. The responsible paralegal did not have knowledge of Seward's Complaint or the date it had been received because it had not been date stamped. R. at 80. Because she lacked knowledge of the date the Complaint arrived and knowledge that Fluor Daniel, Inc. had received the Complaint, she could not have acted carelessly. However, when she did become aware of the need to answer Seward's Complaint, she acted immediately. R. at 80.

Because Fluor Daniel did not act culpably, this Court must consider all of the factors under W.R.Civ.P. 55(c) and 60(b) to determine whether or not good cause has been shown to set aside the entry of default and default judgment rather than truncating the analysis of good cause shown as this Court did in *Vanasse* where the defendant did act culpably. These factors include: (1) Whether the plaintiff will be prejudiced; (2) Whether the defendant has a meritorious defense; (3) Whether culpable conduct of the defendant lead to the default.

D. Seward Misrepresented His Damages.

W.R.Civ.P. 60(b) and 60(b)(3) state that "[o]n motion, and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party."

1. Misrepresentation.

Seward's damages were based upon his bald assertions and those of his hired consultant. They claimed, without any basis, that Seward was on the verge of a promotion to the position of "Environmental Coordinator," that the position of "Environmental Coordinator" existed, and that an "Environmental Coordinator's" salary grade was higher than Seward's at the time of his resignation. R. at 12A-20. These assertions were not supported by anything other than Seward's own statements, and they are false.

Seward has produced insufficient evidence to meet his burden of proving the amount of his damages. Seward's accountant relied upon misrepresentations from Seward himself in order to make his calculations. Seward's accountant failed to review Fluor Daniel's salary schedule. Had Seward's accountant done so, he would have determined that the "Environmental Coordinator" position and salary grade are fictitious. Moreover, Seward's statements about his promotion and salary were beliefs, which are not sufficient to meet his burden of proving damages to a reasonable degree of certainty. *Skane v. Star Valley Ranch Ass'n*, 874 P.2d 897 (Wyo. 1992) (stating that damages may not be presumed); *Cottonwood Valley Ranch, Inc. v. Roberts*, 874 P.2d 897 (Wyo. 1994) (stating that a court may not resort to speculation or conjecture). As a result, the default judgment should be set aside so that the parties may proceed to a trial on the merits.

Rule 60(b)(3) requires Fluor Daniel to show that the judgment was entered mistakenly and that an unjust result occurred. *Lonsdorf v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) (stating, "Fed.R.Civ.P.

60(b)(3) applies to both intentional and unintentional misrepresentations."); *In re Halladay Enterprises, Inc.*, 5 B.R. 83, 86 (Bankr. S.D. Tex. 1980) (stating, "Relief under Rule 60 is not dependent upon a showing of deliberate falsehood in regard to misrepresentation."); *see also, Lacore v. Giralda Bake Shop, Inc.*, 407 So.2d 275, 276 (Fla.App. 3d Dist. 1982) (stating that "a misleading statement by affidavit as to the amount of damages constitutes a misrepresentation by an adverse party . . ." was sufficient to set aside a default judgment.

"Rule 60(b) provides courts with the means of relieving a party from the oppression of a final judgment or order on a proper showing where such judgment is unfairly or mistakenly entered." *S.C. Ryan, Inc. v. Lowe*, 753 P2d 580., 582 (Wyo. 1988). Wyoming law does not favor default judgments; decisions on the merits are preferred when the rules of civil procedure will allow for them. *Claassen v. Nord*, 756 P.2d 189, 193 (Wyo. 1988); *See also, Erickson v. Bennet*, 409 N.W.2d 884,888 (Minn.App. 1987) (holding that where a significant dispute exists with regard to liability and damages and the default hearing lacked any adverse interests, the default judgment should be set aside.).

In *Halberstam v. Cokeley*, 872 P.2d 109 (Wyo. 1988), this Court held that where the plaintiffs could not point to a single iota of evidence establishing the fair market value of a piece of land for which they were awarded damages, the district court had abused its discretion in determining that the damages were liquidated and entering a default judgment. *Halberstam*, 872 P.2d at 113. The same result should be reached in this case. Seward's default judgment is based upon his own self-serving assertions. Seward's accountant relied on the same assertions to make his

calculations, and this cannot establish the reasonable value of the alleged damages.

2. Fraud.

Once a fraud is perpetrated upon the court, it operates to vitiate all proceedings which have occurred prior thereto and requires that an entry of default and default judgment be set aside. In Wyoming it is axiomatic that "fraud vitiates everything." *Nat'l Assoc. of Creditmen, Montana-Wyoming Unite v. Moss*, 349 P.2d 202, 209 (Wyo. 1960); *In re Hartt's Estate*, 295 P.2d 985, 990 (Wyo. 1956). Once a fraud has been perpetrated, all proceedings which occurred prior to the fraud's discovery must be re-examined. *Id.*

Other courts have held that a plaintiff's attempts to augment damages by presenting false information require that default judgments be set aside. In one case, the judgment creditor obtained a default judgment by misrepresenting the nature of the underlying loan's amount and interest rate which was usurious. *National Travis, Inc. v. Gialousakis*, 466 N.Y.S.2d 624 (Sup.Ct. 1983), *affirmed without op.*, 471 NYS2d 1023 (N.Y.A.D 2d Dept. 1984). The Court held that the misrepresentation required the default judgment be set aside. *Id.* at 628; *See also, Thomas v. Calhoun Properties, Inc.*, 576 So.2d 282 (La.App.3d Cir. 1986) (holding that where default judgment is obtained by fraud or ill practice it must be set aside).

After Fluor Daniel's motion to set aside the default, Seward continued to assert that he would have received consistent yearly raises and that he would have been promoted to the position of "Environmental Coordinator." R. at 135, 136. Seward made these assertions despite his review of Fluor Daniel's schedule which was attached to its mo-

tion to set aside the default and despite Seward's lack of the experience and training necessary to achieve promotions. R. at 84. Seward made these claims with knowledge of the fact that his supervisor's successor, Kurt Nielsen, has a Masters degree, ten years experience, and performs duties not performed by Seward or Seward's previous supervisor. R. at 237-38. Seward did not have the education or experience to fill his supervisor's position. R. at 240. Seward's assertions regarding projected promotions and raises constituted fraud. His assertions were designed to augment his alleged damages for purposes of a default judgment.

E. Reasons Other Than Misrepresentation and Excusable Neglect Justify Setting Aside the Entry of Default and Default Judgment.

Rule 69(b)(6) allows a judgment to be set aside where there is reason to justify relief from the operation of a judgment. There are two reasons which justify setting aside the default judgment entered against Fluor Daniel.

First, Seward's judgment is too substantial to be determined according to default procedures. A default judgment of $562,489.00 is too large to overcome the strong public policy in favor of resolving a dispute based upon its merits rather than upon technical default. *See Eitel v. McCool*, 782 F.2d 1470, 1471 (9th Cir. 1986) (one factor to be considered in deciding whether or not to set aside a judgment is the amount of money at stake). "Where the judgment demanded is large, or implicates important public policies, judgment on the merits is strongly favored." 6 J. Moore, *Moore's Federal Practice*, ¶ 55.10[2] at 55-83 to 55-84 (1996.) Matters involving large sums should not be determined by default judgments if it can reasonably be avoided. Any doubt should be re-

solved in favor of the petition to set aside the judgment. *Hutton v. Fisher*, 359 F.2d 913, 916 (3d Cir. 1966) (*citing Tozer v. Charles A. Krauser Milling Co.*, 189 F.2d 242, 245 (3d Cir. 1951)).

Second, Seward's accountant relied upon pure speculation in order to calculate Seward's damages, which violates the Wyoming Rules of Evidence. W.R.E. 703, which is identical to the federal rule, states:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. W.R.E. 703 (emphasis added).

An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record. *Tyger Constr. Co., Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 729, 130 L.Ed.2d 633 (1995); *cf. Reese v. Dow Chemical Co,*, 728 P.2d 1118 (Wyo. 1986) (an expert's testimony was admissible only where it was grounded on facts submitted in the trial record and his testimony subject to cross-examination). An expert's opinion on damages must be causally related to the alleged harm. *Tyger*, 29 F.3d at 142. Seward's accountant made his affidavit based upon assumptions and self-serving speculation provided solely by Seward. This does not meet the standard of reasonable reliance required under

W.R.E. 703. A default judgment based upon speculation must be set aside under W.R.Civ.P. 60(b)(6).

F. Fluor Daniel's Failure to Timely File Its Answer was the Result of Excusable Neglect.

W.R.Civ.P. 60(b)(6) allows for a default judgment to be set aside upon a showing that the default resulted from mistake, inadvertence, surprise, or excusable neglect. The rule is remedial and is to be liberally construed. *Spomer v. Spomer*, 580 P.2d 1146, 1149 (Wyo. 1978). Furthermore, Rules 55(c) and 60(b) are "intended to promote decisions on the merits when possible." *Carlson v. Carlson*, 836 P.2d 297, 301 (Wyo. 1992). Excusable neglect has been defined as such behavior as might be the act of a reasonably prudent person under the circumstances. *Carlson*, 836 P.2d at 303; *Booth v. Magee Carpet Co.*, 548 P.2d 1252, 1255 (Wyo. 1976). Fluor Daniel acted reasonably by implementing a procedure for receiving process. Despite the procedure, Seward's Complaint was not timely answered. However, a clerical mistake does not warrant a half million dollar judgment without some evidence of harm to Seward.

Flour Daniel's registered agent for service of process in Wyoming received the Summons and Complaint and forwarded them to Fluor Daniel, Inc. R. at 206. As a wholly-owned subsidiary of Fluor Daniel, Inc., it is standard practice for process served upon Fluor Daniel to be forwarded to Fluor Daniel, Inc.'s headquarters in Irvine, California. R. at 80. This allows Fluor Daniel, Inc. to retain local counsel and ensure that all complaints are answered timely. R. at 80. When service of process arrives at the California office, the ordinary procedure involves date stamping the documents received and giving them to

a paralegal who ensures that they are properly routed. R. at 79-80.

Fluor Daniel's standard practice for receiving process was in place at the time Seward served Fluor Daniel's registered agent for service of process. R. at 80. The knowledge of Fluor Daniel, Inc.'s paralegal of ten (10) years, neither Fluor Daniel nor Fluor Daniel, Inc. has ever failed to answer timely a properly served complaint. R. at 80. When Fluor Daniel, Inc.'s paralegal first became aware of Seward's Complaint, which was not date stamped, she immediately initiated steps to answer. R. at 80.

Several events occurred at the time of service or shortly thereafter that prevented Fluor Daniel, Inc.'s paralegal from discovering Seward's Complaint. R. at 80-81. These events were added to the paralegal's normal duties during the twenty (20) day answer period. First, on the day the Complaint arrived, the entire legal staff attended the funeral for the spouse of a long-time department member. R. at 80. Second, Fluor Daniel, Inc.'s paralegal spent a substantial amount of time organizing and attending a legal conference between September 15, 1996 and September 25, 1996. Finally, Fluor Daniel, Inc.'s paralegal reported for and served jury duty. R. at 81. Thus, Fluor Daniel's failure to answer was the result of a clerical mistake in failing to date stamp a document, not an attempt to disregard its duty under Wyoming law or to prejudice Seward. R. at 79-81.

G. If the Default Judgment is not Set Aside, Fluor Daniel Should be Allowed to Contest Seward's Damages upon Remand.

Even if the Court finds that Fluor Daniel should admit liability because of the clerical error and

entry of default, the dispute regarding Seward's damages could be resolved without jeopardizing the policies behind the default judgment rules, which include establishing the finality of litigation and promoting the orderly resolution of disputes. The Court's discretion in awarding relief from an entry of default and default judgment under W.R.Civ.P. 55(c) and 60(b) is broad. *See e.g.*. W.R.Civ.P. 60(b) (stating that relief may be granted upon terms as are just). In fact, imaginative and flexible use of the power to impose conditions on the granting of relief may serve to promote the positive purposes of default procedures without subjecting either litigant to the associated drastic consequences. 10 Wright & Miller, *Federal Practice and Procedure*, § 2700 at 539 (1983 & Cum. Supp. 1996). In this case, Fluor Daniel should be allowed, at minimum, to contest Seward's fraudulent misrepresentations of his damages.

IV. CONCLUSION

The district court abused its discretion by failing to set aside the entry of default and default judgment. Good case was shown for setting aside the entry of default. Furthermore, Fluor Daniel has clearly demonstrated that the default judgment was based upon misrepresentations and fraud. Fluor Daniel has demonstrated that the default judgment was far too substantial to be decided upon a technical default and was the result of excusable neglect.

Fluor Daniel is entitled to relief from the entry of default and default judgment entered by the district court in this case. Seward will not be prejudiced if he is simply required to prove the merits of his case. Fluor Daniel has meritorious defenses under Wyoming law, and Fluor Daniel's failure to answer timely was not the result of culpable conduct.

Fluor Daniel respectfully requests that this Court set aside the entry of default and default judgment entered by the district court and remand this action for a determination of Seward's claim upon its merits. However, if the Court does not set aside the entry of default, Fluor Daniel respectfully requests that this matter be remanded so that Fluor Daniel may challenge Seward's fanciful calculation of damages.

Respectfully submitted this 27th day of February, 1997.

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Fluor Daniel (NPOSR), Inc.

Certificate of Service

The undersigned, one of the attorneys for Appellant Fluor Daniel (NPOSR), Inc., does hereby certify that on the 27th day of February, 1997, the above and foregoing Appellant's Brief was served upon counsel for Appellee in above-entitled civil action by depositing a true and correct copy of the same in the United States mail, postage prepaid, and addressed as follows:

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APPENDIX 6 -- APPELLANT'S REPLY BRIEF FILED MARCH 20, 1997

IN THE SUPREME COURT
STATE OF WYOMING
FILED
MAR 20 1997
s/ Judy Pacheco
JUDY PACHECO, CLERK

IN THE SUPREME COURT
STATE OF WYOMING

FLUOR DANIEL (NPOSR), INC., a Delaware corporation, Appellant	)	
vs.	)	No. 97-18
DAVID G. SEWARD, Appellee	)	

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellee David G. Seward ("Seward") completely ignores the facts presented on the record below. Seward misrepresented the fact that he voluntarily resigned from employment with Appellant Fluor Daniel (NPOSR), Inc. ("Fluor Daniel"). Seward misrepresented the fact that he was never offered a promotion either in title or in pay from any member of Fluor Daniel's managerial staff. He also misrepresented the fact that there was no pay grade higher than that received by Seward at the time of his termination associated with the position of "Environmental Coordinator" upon which his exorbitant damages could be based. Further, he misrepresented the fact that even if he had been promoted to his supervisor's position, he would not have been placed in a higher salary grade. Although Seward characterizes his misrepresentations as simple disagreements, these misrepresentations have the self-serving purpose of increasing Seward's damages and enabling Seward to take advantage of the entry of default. The result being, Seward's judgment was unfairly obtained. Under Wyoming Rule of Civil Procedure (60)(b)(3), this Court should not allow a default judgment to be sustained where it is obtained by unfair misrepresentation and fraud.

II. ARGUMENT

A. Seward Made Misrepresentations to the Court which are Grounds for Setting Aside the Entry of Default and Default Judgment.

1. Seward Resigned and Was Not Terminated.

During May of 1996, Seward voluntarily resigned. Seward stated in a written, signed memorandum on May 3, 1996, "[e]ffective today, I resign from my position on the Fluor Daniel (NPOSR), Inc. Casper project." R. at 78. In his reply, Seward correctly states that Mr. Ned Clinton Edwards admitted that he gave Seward the choice of resigning or being terminated. Edwards Deposition, p. 19; R. at 210-220. However, this does not change the fact that Seward exercised his choice to resign. Seward's resignation was voluntary. He was not terminated from his position at Fluor Daniel, and therefore his claim for breach of employment contract cannot stand. Further, Seward has not even alleged a constructive discharge claim. R. at 5.

2. Seward Was Never Offered a Promotion by Any Member of Fluor Daniel's Staff.

Seward claims that he had conversations with Mr. Edwards prior to his termination regarding the **possibility** of Seward taking Ms. Soehn's position. Edwards Deposition, pp. 12-13. Even if these conversations occurred, it is clear that Seward was never told that he would be promoted. R. at 235; Edwards Deposition, p. 12.

3. Seward Misrepresented the Fact that the Position of "Environmental Coordinator" Existed within Fluor Daniel's Pay Structure.

In his brief, Seward confuses a Fluor Daniel organizational chart with an "Environmental Coordinator" position and Fluor Daniel's pay structure which has no such position. R. at 82, 201. It is true that an organizational chart identified Ms. Soehn as "Environmental Coordinator." However, this position

is not associated with a pay grade and is only informally used as a contact point for Fluor Daniel's environmental department when working in the field. Edwards Deposition, p. 7. Fluor Daniel's salary schedule does not contain a pay grade for the "Environmental Coordinator" position. R. at 82, at Ex. F-4. Fluor Daniel has stated in its brief that, "the position of 'Environmental Coordinator' has never existed within Fluor Daniel's pay structure." According to Seward's accountant, Seward's damages calculations were based upon a review of the relevant Fluor Daniel salary schedule. However, for Seward's accountant to affirmatively state that he relied on a Fluor Daniel salary schedule to calculate Seward's damages where no such salary schedule existed and which had a salary grade for "Environmental Coordinator" is nothing less than a misrepresentation. Seward's claim to the contrary cannot stand when compared to the uncontroverted facts presented in the record.

3. Seward's Supervisor Held the Same Salary Grade as Seward.

If Seward had been promoted, the promotion would have resulted in, at best, a minimal change to his pay and not change to his pay grade. It is Seward's misrepresentation of a pay grade change upon which he bases his damages calculations. R. at 82-83. Seward's supervisor, Ms. Soehn, made $27,852.92 per year when she left Fluor Daniel in the Spring of 1996. R. at 82-83. If Seward had been promoted to Ms. Soehn's position and salary, his hourly rate would have increased by only forty-nine cents ($.49) per hour. This is far from the dramatic increase Seward asserts based upon his alleged promotion to the "Environmental Coordinator" pay grade. R. at 83-85. Seward suggests that, Ms. Soehn's predecessor, Carol Stark, was an "A04" level

employee. This is completely irrelevant. Seward's claim is that he would be promoted to his supervisor's position. R. at 14. His supervisor was Ms. Soehn, and she was paid within the same pay grade as Seward. R. at 82. Moreover, Seward does not take into consideration the respective merits of the persons which have held this position. Absent from his discussion regarding these individuals is any reference to their education, training and experience. In fact, Seward's replacement, Kurt Neilsen, had more experience, training, and education than Seward. R. at 237-38, 240, 84.

B. Seward's Misrepresentations and Fraud Should Not be Upheld.

Seward suggests that his misrepresentations are mere differences of opinion regarding the facts of this case. However, the danger of Seward's argument is that it creates an incentive for plaintiffs to exploit an entry of default once it is entered and then claim that any differences in damages calculations are the result of the parties' inconsistent perceptions.

Signed affidavits which misrepresent facts are sufficient to set aside a default judgment especially where the affidavit misstates the plaintiff's damages. *Lacore v. Giralda Bake Shop, Inc.*, 407 So.2d 275, 276-77. (Fla.App. 3d Dist. 1982). Moreover, default judgments based upon incorrect evidence must be set aside, even if the misrepresentation is not based upon conscious deceit. *Thomas v. Calhoun Properties, Inc.*, 576 So.2d 1172, 1174 (La.App. 3d Cir. 1991). Therefore, since the affidavits submitted by Seward misrepresented and misstated his damages, and the default judgment is based upon these misrepresentations, said default judgment must be set aside.

III. CONCLUSION

Seward's brief attempts to characterize all of his misrepresentations as sublime disputes of fact between the parties which do not amount to affirmative misrepresentation. This attempt must fail. All of the facts established by Fluor Daniel are clearly supported by the record and are uncontroverted. Because the facts are uncontroverted, Seward's default judgment must be set aside because it is based upon misrepresentations of material facts and fraud. The default judgment was entered unfairly and must be set aside.

Respectfully submitted this 19th day of March, 1997.

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